Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1996

BRIAN D. WILSON, an individual,
by and through Melinda Wilson as Conservator
of the Person and Estate of Brian D. Wilson,
TODD GOLD, an individual,
and
BRAINS AND GENIUS, a California partnership,

*Petitioners,*

v.

BROTHER RECORDS, INC., a California corporation,
BROTHER TOURS, INC., a California corporation,
and
AL JARDINE, an individual,

*Respondents.*

**On Petition For Writ Of Certiorari**
**To The Supreme Court Of The State Of New Hampshire**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether mere awareness on the part of independent contractor authors that their manuscript may be sold by third parties in the forum State constitutes purposeful availment and provides minimum contacts between the authors and the forum State such that the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice.

## LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest in the outcome of this litigation. There are no other parties or subsidiary companies which are required to be listed. Petitioners herein and defendants in action below:

Brian D. Wilson, by and through the Court appointed Conservator of the Person and Estate

Todd Gold

Brains and Genius, a California Partnership

Respondents herein and plaintiffs in action below:

Brother Records, Inc.

Brother Tours, Inc.

Alan Jardine

Other defendants in action below:

Eugene Landy

HarperCollins Publishers

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED FOR REVIEW | i |
| LIST OF INTERESTED PARTIES | ii |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE | 2 |
| STATUTES AND RULES INVOLVED IN THIS CASE | 2 |
| NATURE OF THE CASE AND PROCEDURAL HISTORY | 3 |
| I. The Underlying Claims | 3 |
| II. The Dispute Concerning The New Hampshire Superior Court's Exercise Of Personal Jurisdiction Over Wilson, Gold And B&G | 5 |
| THE REASONS FOR GRANTING THIS PETITION | 7 |
| III. Introduction And Summary Of Argument | 7 |
| IV. Argument | 10 |
| A. The New Hampshire Supreme Court's Decision Regarding Personal Jurisdiction Conflicts With This Court's Relevant Decisions | 10 |
| 1. This Court's Pronouncements In *Calder* And *Keeton* Require Purposeful Acts Directed At The Forum State Or Its Residents | 10 |

TABLE OF CONTENTS – Continued

Page

2. Jurisdictional Decisions Since *Calder* And *Keeton* Similarly Preclude Jurisdiction In The Absence Of Purposeful Acts Directed At The Forum State Or Its Residents ..... 13

3. The Supreme Court Of New Hampshire Improperly Upheld The Exercise Of Personal Jurisdiction In The Absence Of Any Purposeful Act By Wilson, Gold Or B&G Directed At New Hampshire Or Its Residents .... 16

B. The New Hampshire Supreme Court's Decision Regarding Personal Jurisdiction Conflicts With Pertinent Decisions Of The United States Court Of Appeals ..... 19

CONCLUSION ..... 21

## TABLE OF AUTHORITIES

Page

CASES

*Asahi Metal Indus. Co., Ltd. v. Super. Ct. of California, Solano County*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987).....13, 15-18

*Brother Records, Inc. v. HarperCollins Publishers*, 682 A.2d 714 (N.H. 1996).....1, 7

*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).....13-15, 17

*Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)..... 8-9, 11-12, 17

*Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984).... 8-9, 12-13, 17

*McFarlane v. Esquire Magazine*, 74 F.3d 1296 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 53, 136 L. Ed. 2d 16 (1996)..... 19-20

*Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 423, 130 L. Ed. 2d 338 (1994)..... 19-21

STATUTES/RULES

Constitution of the United States, Amendment XIV:

§ 1.....2, 17

## OPINIONS BELOW

The Ruling of the Supreme Court of New Hampshire is reported in West's Atlantic Reporter, Second Series, as *Brother Records, Inc. v. HarperCollins Publishers*, 682 A.2d 714 (1996) (App. 23-34). The Ruling of the Superior Court of the State of New Hampshire is unreported. (App. 2-22).

## JURISDICTION

On September 13, 1994, Brother Records, Inc., Brother Tours, Inc. and Alan Jardine ("Respondents") brought this action in the Superior Court of the State of New Hampshire against HarperCollins Publishers, a corporation, Brian D. Wilson ("Wilson"),[1] Todd Gold ("Gold"), Eugene Landy, and Brains and Genius, a California partnership ("B&G") (Wilson, Gold and B&G are collectively, the "Petitioners") (App. 35-68); on December 1, 1994, the Petitioners appeared specially and filed separate Motions to Dismiss for Lack of Personal Jurisdiction which were denied by Order of the Superior Court entered on March 1, 1995 (App. 2-22); Petitioners timely filed their Notice of Appeal on March 30, 1995 (App. 232-45); Petitioners' appeal was denied by the Supreme Court of New Hampshire by Order entered on September 25, 1996. (App.

[1] Wilson was sued by and through his then Conservator, Jerome Billet, Esq. Subsequent to the filing, Melinda Wilson was appointed Conservator of Wilson's person and estate, replacing Jerome Billet.

23-34). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. (App. 229).

## CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

Constitution of the United States, Amendment XIV:

§ 1. Citizenship right not be abridged by states.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTES AND RULES INVOLVED IN THIS CASE

New Hampshire Statutes:

Title LII. Actions, Process, and Service of Process, Chapter 510. Service of Writs § 510:4. Nonresident Defendant

> I. Jurisdiction. Any person who is not an inhabitant of this state and who, in person or through an agent, transacts any business within this state, commits a tortious act within this state, or has the ownership, use, or possession of any real or personal property situated in this state submits himself, or his personal representative, to the jurisdiction of the courts of this

state as to any cause of action arising from or growing out of the acts enumerated above.

## NATURE OF THE CASE AND PROCEDURAL HISTORY

### I. The Underlying Claims

This petition for *certiorari* arises from an action for defamation commenced by a member of the Beach Boys, a group which played rock and roll music and which became one of the most popular musical groups in America and by the two corporations by which the Beach Boys transact business. (App. 35-68). The five original members of the Beach Boys were brothers Brian, Carl and Dennis Wilson, Michael Love and Alan Jardine. (App. 39, 43, 71).

In the first few years of the Beach Boys' existence, Petitioner Brian Wilson ("Wilson") wrote and produced music for the group and participated in live performances. (App. 41-42). These performances took the group to many areas of the country, and Wilson may even have performed with the Beach Boys in New Hampshire. (App. 39, 71). After approximately 1965, however, Wilson performed with the Beach Boys only on rare occasions, and his activities as a member of the group did not take him to New Hampshire. (App. 71).

In September 1991, a book entitled "Wouldn't It Be Nice" (the "Book"), which purported to be the autobiography of Wilson was published by defendant HarperCollins Publishers ("HarperCollins"). (App. 39, 73). The Book itself credited "Brian Wilson with Todd Gold" with authorship; at the time, Todd Gold ("Gold") was a professional writer living in California and working for "People Weekly" magazine. (App. 90, 92, 176). The Book chronicled portions of Wilson's life in detail, but none of the individuals or entities mentioned in the Book resided or were located in New Hampshire. (App. 73). The focal point of all of the events described in the Book was California, and none took place in New Hampshire. (App. 73).

In September 1994, after the statute of limitations on defamation claims had run in almost all other jurisdictions in the United States, Respondents Alan Jardine and Brother Records, Inc. and Brother Tours, Inc., two California corporations through which the Beach Boys have conducted business, commenced this action for libel, alleging that their reputations were harmed by defamatory passages of the Book. (App. 37-68). The action was brought by Writ of Summons filed in the Superior Court for the Southern District of Hillsborough County, New Hampshire (the "Complaint"). (App. 35-68). Named as defendants in the lawsuit were Wilson; Gold; Eugene Landy, Wilson's former psychotherapist and occasional business collaborator; Brains and Genius ("B&G"), a California partnership allegedly consisting of Wilson and Landy; and HarperCollins. (App. 37). The Complaint alleged that HarperCollins had published the Book and

caused it to be distributed in New Hampshire, and that the other defendants participated in various ways in producing the Book. (App. 39-40, 46).

Notably, the Complaint did not allege any direct contacts between Gold and the State of New Hampshire, either pertaining to the Book or otherwise. (App. 37-68). Rather, the jurisdictional allegations against Gold were limited to the assertion that "[t]hrough his involvement with the publication of the Book in New Hampshire and across the country, Defendant Gold has transacted business and committed tortious acts within the State of New Hampshire." (App. 39-40).

The Complaint contained identical allegations against Wilson and B&G. (App. 39-40). The plaintiffs further alleged that "Wilson conducted interviews with media persons who regularly broadcast their shows into New Hampshire or circulated newspapers or magazines in that state." (App. 46). However, the Complaint contained no specific allegations that the broadcasts or publication of these interviews occurred in New Hampshire or of any direct contact on the part of either Wilson or B&G with New Hampshire. (App. 37-68).

## II. The Dispute Concerning The New Hampshire Superior Court's Exercise Of Personal Jurisdiction Over Wilson, Gold And B&G

Wilson, Gold and B&G specially appeared in the action in December 1994 and filed separate motions to dismiss for lack of personal jurisdiction. These defendants each asserted that the New Hampshire Superior

Court's exercise of jurisdiction over them would be inconsistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which requires that there be certain "minimum contacts" between the defendants and the forum in order for the defendants to be required to defend an action in the forum, and that the exercise of jurisdiction otherwise comport with "traditional notions of fair play and substantial justice."

In support of their motions, these defendants submitted uncontroverted affidavits which established, *inter alia*:

- That the Book was written pursuant to an agreement entered into in California between Gold and B&G (the "Collaboration Agreement") (App. 75-90, 93, 119-34);

- That both Wilson and Gold were living in California at the time the Book was written (App. 71, 93);

- That all interviews and other research for the Book was conducted in California (App. 73, 93);

- That Gold's role in the production, publication and distribution of the Book ended with his submission of the manuscript to B&G in California (App. 73, 93-94);

- That pursuant to an agreement between B&G and HarperCollins regarding publication and distribution of the Book (the "Publication Agreement"), "all details of publication, including manufacture, format and design, distribution, pricing, advertising and promotion and distribution of free copies [were]

determined by [HarperCollins]," and not by Wilson, Gold or B&G (App. 135-66);

- That although Wilson participated in interviews with media outlets to promote the Book subsequent to its publication, none of these interviews took place in New Hampshire (App. 73); and,

- That neither Wilson nor Gold derived any income from the sale of copies of the Book in New Hampshire (App. 74, 94).

The New Hampshire Superior Court heard defendants' motions to dismiss on February 10, 1995, and on March 1, 1995 issued an order denying each such motion. (App. 2-22). Wilson, Gold and B&G filed their timely notice of appeal to the New Hampshire Supreme Court on March 30, 1995. (App. 232-45). On September 25, 1996, the New Hampshire Supreme Court affirmed the Superior Court's denial of the motions to dismiss. *See Brother Records, Inc. v. HarperCollins Publishers*, 682 A.2d 714 (N.H. 1996). (App. 23-34).

## THE REASONS FOR GRANTING THIS PETITION

### III. Introduction And Summary Of Argument

This Petition is necessitated by a published decision of the Supreme Court of New Hampshire on a question of federal constitutional law which is squarely at odds with this Court's pronouncements and with pertinent decisions of the District of Columbia Circuit and the Sixth Circuit of the United States Court of Appeals.

By this Petition, Wilson, Gold and B&G seek to reverse the New Hampshire Supreme Court's wayward decision which, if applied in this age of the electronic media's expanded reach, would allow a plaintiff to hale authors (and other creators) into any forum based merely upon extremely attenuated and fortuitous contacts which these authors may have with a forum State. Absent the granting of *certiorari* requested herein, other courts can and will interpret the New Hampshire decision to stretch this Court's strict interpretation of the Due Process Clause and improperly conclude (as did the New Hampshire court) that the unilateral actions of a third-party publisher are sufficient to subject authors, reporters and other creators to personal jurisdiction in the forum State.

In 1984, this Court issued two decisions governing the exercise of personal jurisdiction in the context of civil suits for defamation, namely, *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984) and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984). In *Calder*, this Court considered a California state court's exercise of personal jurisdiction over residents of Florida in a libel lawsuit commenced by the entertainer Shirley Jones, a California resident. Reasoning that the defendants knew that the "brunt" of the alleged libel "would be felt by respondent in the State in which she lives," this Court found that the defendants "must 'reasonably anticipate being haled into court there to answer for the truth of the statements made in their article.' " *Calder*, 465 U.S. at 789-90 (citation omitted). Thus, this Court upheld California's exercise of jurisdiction, but only because the defendants were "primary

participants in an alleged wrongdoing *intentionally directed at a California resident." Id.* at 790 (emphasis added).

*Keeton* presented a somewhat different circumstance, in which the plaintiff, a resident of New York, commenced a libel action in New Hampshire against nonresident defendants including Hustler Magazine, Inc., an Ohio corporation with its principal place of business in California. While concluding that "plaintiff's residence in the forum State is not a separate requirement" to establish personal jurisdiction in a defamation action, the Court found the defendants to be subject to personal jurisdiction in New Hampshire because they had "continuously and deliberately exploited the New Hampshire market" through "regular monthly sales of thousands of magazines[.]" *Keeton*, 465 U.S. at 1481 and 1478.

In this case, the New Hampshire Supreme Court upheld the trial court's exercise of personal jurisdiction despite the absence of *any* factors which could satisfy the criteria which this Court articulated in *Calder* and *Keeton*. Unlike the defendants in *Calder*, the petitioners herein indisputably did not intentionally direct any conduct at the forum State or one of its residents (App. 74, 94-95); rather, the allegedly defamatory publication at issue here was researched and written in California, with persons and events in California comprising the entirety of its subject matter. (App. 73, 93). Nor have these petitioners engaged in the sale or distribution of any offending material in New Hampshire, as did the defendants in *Keeton*. On the contrary, it is undisputed that petitioners' responsibility for the Book came to an end upon completion of the manuscript, and that copies of the Book found their

way to New Hampshire not through any action on the part of Wilson, Gold or B&G, but solely through the actions of the Book's publisher, HarperCollins. (App. 73, 93-94, 135-66).

As explained below, the New Hampshire court's exercise of personal jurisdiction over Wilson, Gold and B&G violates the Due Process Clause of the Fourteenth Amendment, and runs afoul of the reasoning this Court applied in *Calder* and *Keeton*. A review of *Calder*, *Keeton* and this Court's subsequent decisions, and as well as pertinent application of *Calder* and *Keeton* by the United States Court of Appeals, demonstrates the existence of a conflict between federal law and the holding of the New Hampshire Supreme Court, requiring this Court's review.

## IV. Argument

### A. The New Hampshire Supreme Court's Decision Regarding Personal Jurisdiction Conflicts With This Court's Relevant Decisions.

#### 1. This Court's Pronouncements In *Calder* And *Keeton* Require Purposeful Acts Directed At The Forum State Or Its Residents.

In *Calder* and *Keeton*, this Court delineated two alternative sets of criteria under which courts are to assess the propriety of the exercise of personal jurisdiction over non-resident defendants in civil suits for defamation. A review of *Calder* and *Keeton* demonstrates that the Due Process Clause precludes the exercise of personal jurisdiction except where a defendant either intentionally directed the brunt of a defamatory communication at the

forum State or deliberately exploited the forum State's commercial market.

*Calder* arose from an article in the *National Enquirer* alleging that Shirley Jones, an actress and California resident, "drank so heavily as to prevent her from fulfilling her professional obligations." *Calder*, 465 U.S. at 788, n. 9. The story in question was drawn from California sources and pertained to Ms. Jones' activity in California. *Id.* at 788. Additionally, as Ms. Jones alleged, "the brunt of the harm, in terms both of [her] emotional distress and the injury to her professional reputation, was suffered in California." *Id.* at 789.

Assessing these facts, this Court upheld California's exercise of personal jurisdiction against the reporter and editor responsible for the allegedly defamatory article. As this Court explained, the holding was not predicated on any theory even approaching that applied in this case by the New Hampshire Supreme Court which endorses the exercise of personal jurisdiction over virtually any non-resident defendant who authors an allegedly defamatory statement which later is published in the forum State. Rather, this Court's reasoning in *Calder* turned on the fact that California was the unmistakable target of the defendants' intentional activity:

> [T]heir intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder wrote and edited an article that they knew would have a potentially devastating impact upon [Ms. Jones]. And they knew that the brunt of that injury would be felt by [Ms. Jones] in the State

> in which she lives and works and in which the *National Enquirer* has its largest circulation.

*Id.* at 789-90.

In short, *Calder* stands for the limited proposition that a state court may exercise personal jurisdiction over a non-resident defendant where the forum State "is the focal point of the [allegedly defamatory] story and of the harm suffered." *Id.* at 789.

*Keeton* articulates a different yet equally limited basis for personal jurisdiction. *Keeton* arose from allegedly defamatory statements published in *Hustler Magazine* regarding the plaintiff, Kathy Keeton. After the statute of limitations had run in other jurisdictions, Ms. Keeton, a resident of New York, sued *Hustler Magazine* in the United States District Court for the District of New Hampshire. The District Court dismissed Ms. Keeton's claims for lack of personal jurisdiction over Hustler Magazine, Inc., an Ohio corporation with its principal place of business in California. The United States Court of Appeals for the First Circuit affirmed the dismissal, prompting Ms. Keeton to petition for *certiorari*. This Court granted *certiorari* and reversed the First Circuit, on the basis of a record which demonstrated that Hustler Magazine Inc.'s contacts with New Hampshire "consist[ed] of the sale of some 10,000 to 15,000 copies of *Hustler Magazine* in that State each month." *Keeton*, 465 U.S. at 772. Assessing the significance of those sales for purposes of personal jurisdiction, this Court observed:

> [*Hustler Magazine's*] regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine. . . . Such

> regular monthly sales of thousands of magazines cannot by any stretch of the imagination be characterized as random, isolated or fortuitous.

*Id.* at 773-74.

*Keeton*, therefore, stands for the propriety of personal jurisdiction where, unlike Wilson, Gold and B&G here, a defendant is directly responsible for the continuous and deliberate exploitation of the media markets in the forum State.

### 2. Jurisdictional Decisions Since *Calder* And *Keeton* Similarly Preclude Jurisdiction In The Absence Of Purposeful Acts Directed At The Forum State Or Its Residents.

In the aftermath of *Calder* and *Keeton*, this Court's decisions on the issue of personal jurisdiction have uniformly underscored the same basic principle, namely, that "purposeful availment" through intentional conduct directed at the forum State is necessary for the exercise of personal jurisdiction to withstand scrutiny under the Due Process Clause. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); *Asahi Metal Indus. Co., Ltd. v. Super. Ct. of California, Solano County*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987).

*Burger King* arose from the business relationship between Burger King, a company based in Miami, Florida which operates a chain of hamburger restaurants, and one of its franchisees who resided in Michigan and contracted to develop and run a Burger King restaurant

there. After disputes developed regarding monthly royalties payable to Burger King under the applicable franchise agreement, Burger King commenced litigation in the United States District Court for the Southern District of Florida. The district court exercised personal jurisdiction over the franchisee, who appealed to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit reversed, prompting Burger King's petition to this Court.

In granting Burger King's petition and reversing the Eleventh Circuit, this Court cited *Keeton* to underscore that the "purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous or attenuated contacts." *Burger King*, 471 U.S. at 475 (citations and internal quotation marks omitted). This Court also reiterated that the "unilateral activity of another party or a third person" will not suffice to subject a defendant to personal jurisdiction in a forum State. *Id.*

Applying these guidelines, this Court found the franchisee to be subject to personal jurisdiction in Florida based on the factual record establishing that he had "negotiated with a Florida corporation for the purchase of a long-term franchise," and "entered into a carefully-structured 20-year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida," among other purposeful contacts with the forum. *Id.* at 479-80. Additionally, throughout their business relationship, "the Miami headquarters and the Michigan franchisees carried on a continuous course of direct communications by mail and by telephone, and it was the

Miami headquarters that made the key negotiating decisions out of which the instant litigation arose." *Id.* at 481.

Only in light of these factors, none of which are present in the record which the New Hampshire Supreme Court considered in this case, did this Court conclude that the franchisee "established a substantial and continuing relationship with Burger King's Miami headquarters, received fair notice from the contract documents and course of dealing that he might be subject to suit in Florida, and . . . failed to demonstrate how jurisdiction in that forum would be fundamentally unfair[.]" *Id.* at 487.

Consistent with this Court's emphasis in *Burger King* on the Due Process requirement that a defendant have intentional and substantial contacts with the forum State, a plurality of this Court in *Asahi Metal* clarified that "a defendant's awareness that the stream of commerce may or will sweep [his] product into the forum State does not convert the mere act of placing the product in the stream into an act purposefully directed toward the forum State." *Asahi Metal*, 480 U.S. at 112. *Asahi Metal* arose from a motorcycle accident in Solano County, California; the motorcyclist commenced a product liability action, alleging that the accident was caused by an explosion in the rear tire of his motorcycle. After being named as a defendant, the manufacturer of the tire's inner tube filed a cross-complaint against Asahi Metal Industry Co. ("Asahi"), which manufactured the tube's valve assembly. The California Superior Court in Solano County denied Asahi's motion to quash service of summons for lack of personal jurisdiction; appellate proceedings followed, culminating in the Supreme Court of California's decision that Asahi was subject to personal jurisdiction in

California based on its "placing its components into the stream of commerce," coupled with its "awareness that some of the components would eventually find their way into California." *Id.* at 108.

This Court granted *certiorari* and reversed the decision of the Supreme Court of California, with a plurality of Justices concluding that Asahi lacked the minimum contacts with California necessary to subject it to personal jurisdiction. Central to the plurality opinion was the evidence that, like Wilson, Gold and B&G here, Asahi did not purposefully avail itself of the market in the forum State, even if Asahi knew that some of its valves would find their way into California:

> Asahi does not do business in California. It has no offices, agents, employees, or property in California. It does not advertise or otherwise solicit business in California. It did not create, control, or employ the distribution system that brought its valves to California. . . . On the basis of these facts, the exertion of personal jurisdiction over Asahi by the Superior Court of California exceeds the limits of due process.

*Id.* at 112-13.

### 3. The Supreme Court Of New Hampshire Improperly Upheld The Exercise Of Personal Jurisdiction In The Absence Of Any Purposeful Act By Wilson, Gold Or B&G Directed At New Hampshire Or Its Residents.

As the foregoing review demonstrates, this Court's pertinent pronouncements on the issue of personal jurisdiction have established clear criteria which must be

satisfied for a state court's exercise of personal jurisdiction to withstand scrutiny under the Due Process Clause of the Fourteenth Amendment. In the context of civil suits for defamation, *Calder* provides for jurisdiction only where there is an unmistakable nexus between the allegedly defamatory publication and the forum State, 465 U.S. at 789-90; *Keeton* provides an alternative basis for jurisdiction only where a defendant, through direct, recurring business ties to the forum State, intentionally has exploited the forum State's market. 465 U.S. at 781. In the broader context, *Burger King* underscores the requirement of purposeful acts specifically directed at the forum State, 471 U.S. at 472, and *Asahi Metal* precludes the exercise of personal jurisdiction based on the mere foreseeability of a defendant's product finding its way to the forum State. 480 U.S. at 112.

The New Hampshire Supreme Court here approved the exercise of personal jurisdiction on facts which fall well beyond the parameters which this Court has delineated. In contrast to *Calder*, the record here establishes that the Book was not researched in the forum State, does not describe any events which occurred there, and does not pertain to any of the forum State's residents. (App. 73, 93). Unlike the defendants in *Keeton*, Wilson, Gold and B&G have no business ties to New Hampshire, with regard to the Book or otherwise (App. 69-74, 92-95); indeed, pursuant to the Publication Agreement between B&G and HarperCollins to which Gold and Wilson were *not* parties, all details of the Book's publication, promotion and distribution are left to HarperCollins' sole discretion. (App. 75-90, 119-66). Nor do the factors present in *Burger King* exist here; whereas *Burger King* involved a

contractual relationship which expressly provided for the defendant franchisee to interact regularly with corporate headquarters in Florida, the only agreements to which Wilson and Gold are parties required research and writing services which these defendants performed exclusively in California. (App. 73, 93).

Indeed, the record here resembles the facts which the Court considered in *Asahi Metal*. Admittedly, Wilson, Gold and B&G each entered into agreements which acknowledged that the Book might be distributed through normal retail channels in the United States. (App. 29-30, 83, 127). Similarly, in *Asahi Metal*, the record contained evidence "that Asahi was fully aware that [its] valve stem assemblies . . . would end up throughout the United States and in California." *Asahi Metal*, 480 U.S. at 107. Nevertheless, as the plurality observed in *Asahi Metal*, "the placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id.* at 112. In focusing on the acknowledgement of B&G that HarperCollins could distribute the Book throughout the United States, the Supreme Court of New Hampshire erroneously seized upon these defendants' roles in the placement of the Book into the stream of commerce as the basis for the exercise of personal jurisdiction. That disregard of the requirement of purposeful activity directed at the forum State or its residents conflicts with this Court's holdings on personal jurisdiction and warrants a grant of *certiorari*.

### B. The New Hampshire Supreme Court's Decision Regarding Personal Jurisdiction Conflicts With Pertinent Decisions Of The United States Court Of Appeals.

Beyond conflicting with this Court's pronouncements on personal jurisdiction, the decision of the New Hampshire Supreme Court to uphold the exercise of personal jurisdiction over Wilson, Gold and B&G conflicts with decisions of the United States Court of Appeals. As demonstrated below, at least two circuits have applied the principles articulated in *Calder* and *Keeton* to circumscribe the exercise of personal jurisdiction over authors of allegedly defamatory statements where, as here, the authors are not directly responsible for the publication of those statements in the forum State. *See, e.g., McFarlane v. Esquire Magazine*, 74 F.3d 1296 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 53, 136 L. Ed. 2d 16 (1996); *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 423, 130 L. Ed. 2d 338 (1994).

*McFarlane* arose from the publication of an article in *Esquire Magazine* regarding the plaintiff Robert McFarlane, whom the article insinuated had secretly worked as an Israeli intelligence agent while in the employ of the United States government. Mr. McFarlane commenced an action for defamation in the United States District Court for the District of Columbia, which entered summary judgment in favor of the defendants; Mr. McFarlane appealed. Among other issues, the District of Columbia Circuit in *McFarlane* considered the issue of the district court's jurisdiction over the author of the allegedly defamatory article. In explaining why the author, as distinct from the publisher of the article, was

not subject to personal jurisdiction in the District of Columbia under the applicable long-arm statute, the Circuit underscored a distinction which the New Hampshire Supreme Court overlooked here:

> [W]riting an article for a publication that is circulated throughout the nation, including the District, hardly constitutes doing or soliciting business, or engaging in a persistent course of conduct, *within* the District. *The writer is not the publisher*; [the writer's] contacts [with the forum] must be assessed separately.

*McFarlane*, 74 F.3d at 1300 (second emphasis added).

The Sixth Circuit underscored the same distinction in *Reynolds*. *Reynolds* arose from a press release issued by the International Amateur Athletic Federation (the "Federation"), an organization based in London, England. The Federation issued a press release stating that Harry "Butch" Reynolds, a competitive sprinter, had tested positive for a banned substance at a track meet in Monaco. Mr. Reynolds filed suit in the United States District Court for the Southern District of Ohio, for defamation among other claims, alleging that the Federation's press release caused him to lose over $4,000,000 which he otherwise would have received in endorsements and appearance fees in Ohio. *Reynolds*, 23 F.3d at 1117. After the district court entered judgment against the Federation, it appealed on jurisdictional grounds, *inter alia*.

The Sixth Circuit reversed the district court's exercise of personal jurisdiction over the Federation. Distinguishing *Calder*, the Sixth Circuit emphasized a number of facts which are equally present on the facts at issue here:

> First, the press release concerned Reynold's activities in Monaco, not Ohio. Second, the source of the controversial report was the drug sample taken in Monaco and the laboratory testing in France. Third, Reynolds is an international athlete whose professional reputation is not centered in Ohio. Fourth, the defendant itself did not publish or circulate the report in Ohio; Ohio periodicals disseminated the report. Fifth, Ohio was not the "focal point" of the press release. The fact that the [Federation] could foresee that the report would be circulated and have an effect in Ohio is not, in itself, enough to create personal jurisdiction.

23 F.3d at 1120.

The decision of the New Hampshire Supreme Court here ignores the distinctions recognized by the courts in *McFarlane* and *Reynolds*. Like the author involved in *McFarlane*, the involvement of Wilson, Gold and B&G here in allegedly making defamatory statements was limited to authorship of the underlying manuscript and did not include publication. (App. 73-90, 94-95). Their contacts with New Hampshire, in contrast to those of HarperCollins, are non-existent. Likewise, like the defendant in *Reynolds*, Wilson, Gold and B&G did not make the forum State the focal point of the allegedly defamatory statements and did not themselves publish or circulate the Book there. (App. 73, 94).

## CONCLUSION

*Calder, Keeton* and their progeny clearly illustrate this Court's interpretation of the Due Process Clause and the

limits of personal jurisdiction. Petitioners' entirely fortuitous and attenuated contacts with the State of New Hampshire cannot support the exercise of personal jurisdiction. Absent a grant of *certiorari* and a reversal by this Court, the opinion below can and will be used by courts throughout the Nation as a signal of the demise of the criteria established in *Calder, Keeton* and their progeny. As a result, other forums may seek to enlarge their jurisdiction to include all foreign contributors to new and old forms of constitutionally-protected media simply by reason of their distant placement of expression in the stream of commerce.

For all of the foregoing reasons, Petitioners respectively pray that this Court grant their petition for *certiorari* to prevent the incipient erosion of traditional notions of fair play and substantial justice.

Respectfully submitted,

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THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT
SOUTHERN DISTRICT OF HILLSBOROUGH COUNTY

Marshall A. Buttrick, Clerk
30 Spring Street
Nashua, N.H. 03061-2072
(603) 883-6461

January 03, 1995

NOTICE OF DECISION

NO: 94-C-00573-WS

Brother Records, Inc. vs. HarperCollins, Publishers

You are hereby notified that on December 29, 1994 the following order was entered in the above matter:

RE: PLAINTIFFS' MOTION TO ENLARGE TIME TO RESPOND TO DEFENDANTS' MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION

"Motion Granted."

(Hampsey, J.)

MAB/llb

CC: Landy, Eugene
Flynn, Esq., Michael J
Tabb, Esq., Michael
Chieffo, Esq., Vincent H
Rich, Esq., Bruce
Daniels, Esq., Katherine J
George-Kane Esq, Beth
Chapman Esq, William L

Richard C Gagliuso Esq
Deasy & Dwyer PA
400 Amherst Street Suite 201
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THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT
SOUTHERN DISTRICT OF
HILLSBOROUGH COUNTY

Marshall A. Buttrick, Clerk
30 Spring Street
Nashua, N.H. 03061-2072
(603) 883-6461

March 01, 1995

NOTICE OF DECISION

NO: 94-C-00573-WS

Brother Records, Inc. vs. HarperCollins, Publishers

You are hereby notified that on March 1, 1995 the following order was entered in the above matter:

RE: DEFENDANTS' MOTION TO DISMISS

Please see copy of Order enclosed. (Murphy,J.)

MAB/sjw

CC: Landy, Eugene
Flynn, Esq., Michael J
Tabb, Esq., Michael
Chieffo, Esq., Vincent H
Rich, Esq., Bruce
Daniels, Esq., Katherine J
George-Kane Esq, Beth
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STATE OF NEW HAMPSHIRE

Hillsborough, ss.
Southern District

Superior Court
94-C-00573-WS

Brother Records, Inc., Brother Tours, Inc., and Alan Jardine

v.

HarperCollins Publishers, Brian D. Wilson by and through Jerome S. Billet as conservator of Brian D. Wilson, Todd Gold, Eugene Landy, Brains and Genius, and Does 1-50

## ORDER ON DEFENDANTS' MOTIONS TO DISMISS

A non-evidentiary hearing was held before the undersigned on February 10, 1995 on the defendants' Motions to Dismiss which are addressed as follows:

### A. Motions to Dismiss for Lack of Jurisdiction

The defendants, excluding HarperCollins, have moved to dismiss the plaintiffs' eight-count writ for lack of personal jurisdiction. The plaintiffs' action arises from alleged defamatory statements contained in a nationally distributed book entitled "Wouldn't It Be Nice." The issue before the Court is whether each moving defendant has sufficient "minimum contacts" with New Hampshire as the forum state such that requiring them to defend in this Court would not offend "traditional notions of fair play and substantial justice." With respect to this issue, the Court finds the following to be relevant.

As alleged in the plaintiffs' writ, in September 1991, the alleged defamatory book was published and distributed for sale nationally, including within New Hampshire. The book purports to be the autobiography of Brian Wilson, one of the defendants and a member of a music group calling themselves the "Beach Boys." Brian Wilson has been a member of the "Beach Boys" since the group was founded in 1961, but stopped touring with the group in the mid-1960s due to mental stress and strain. Todd Gold is the co-author and/or editor of the book. The plaintiffs allege that Eugene Landy, Brian Wilson's one time psychologist, controlled the content of the book by shaping, revising and editing new material. The plaintiffs contend that Landy was instrumental in the creation of the book and used it in an effort to restore his reputation with respect to what the plaintiffs assert is his mis-management of Brian Wilson's business and personal affairs. Brains & Genius ["B & G"], a partnership created by Landy and Wilson, is alleged to have signed the contract for publication with HarperCollins. Plaintiffs Brother Records, Inc. and Brother Tours, Inc. are the corporate owners of the "Beach Boys" and do business on the group's behalf. Plaintiff Alan Jardine is a member of the "Beach Boys."

When personal jurisdiction is challenged by a defendant, the plaintiff bears the burden of demonstrating sufficient prima facie facts to support the exercise of personal jurisdiction. *Phelps v. Kingston*, 130 N.H. 166, 170 (1987); *Ticketmaster – N.Y., Inc. v. Alioto*, 26 F.3d 201, 203 (1st Cir. 1994). When determining whether to exercise personal jurisdiction, the Court may consider pleadings, affidavits and other evidentiary material. *Lex Computer*

*and Management v. Eslinger & Pelton, P.C.*, 676 F.Supp. 399, 402 (D.N.H. 1987). Because this is a motion to dismiss, the Court must accept as true the plaintiffs' well-pled facts and construe all reasonable inferences in favor of the plaintiffs. *Island Shores Estates Condominium Ass'n v. City of Concord*, 136 N.H. 300, 302-03 (1992). However, the Court need not accept as true statements in the writ which are mere conclusions of law. *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 45 (1987).

For the Court to exercise personal jurisdiction over a non-resident defendant, two elements must be satisfied. First, the forum state's long-arm statute must apply. *Phelps*, 130 N.H. at 170; *Buckley v. MacGraw-Hill, Inc.*, 762 F.Supp. 430, 436 (D.N.H. 1991). Because the defendants concede to the application of New Hampshire's long-arm statute for purposes of this motion, the only remaining element requiring resolution is whether the requirements of constitutional due process are satisfied; that is, whether each of the moving defendants has had sufficient "minimum contacts" with New Hampshire such that this State exercising jurisdiction "would not offend traditional notions of fair play and substantial justice." *Buckley*, 762 F.Supp. at 437; *International Shoe Co. v. Washington*, 66 S.Ct. 154, 158 (1945); *Calder v. Jones*, 104 S.Ct. 1482, 1486 (1984). Further, because the plaintiffs have asserted that the Court has "specific jurisdiction" rather than general jurisdiction over the defendants, the Court so limits its analysis.

To have minimum contacts consistent with specific jurisdiction, the cause of action must have arisen out of or relate to each defendant's conduct with the forum and

each defendant must have "purposefully availed [it/himself] of the privilege of conducting activities within the forum state." *Ticketmaster – N.Y., Inc.*, 26 F.3d at 206 (citing *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 104 S.Ct. 1868, 1872 (1984) and *Hanson v. Denckla*, 78 S.Ct. 1228, 1240 (1958)); *see also Phelps*, 130 N.H. at 170. With respect to "purposeful availment," though it is relevant, mere foreseeability is not enough. *World-Wide Volkswagen Corp. v. Woodson*, 100 S.Ct. 559, 566-67 (1980). Instead, "it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 567. That is, if each defendant has "purposefully availed" it/himself of conducting activities within the forum, then the defendant had notice of being subject to a suit there. *Id.*

When asserting specific jurisdiction, the "purposeful availment" requirement is not satisfied by mere random, fortuitous or attenuated contacts with the forum nor by the unilateral activity of a third person, but only if the defendant's efforts are "purposefully directed" towards the forum state. *Burger King Corp. v. Rudzewicz*, 105 S.Ct. 2174, 2182 and 2184 (1985) (quotations and citations omitted); *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473, 1478 (1984); *Phelps*, 130 N.H. at 172. It is the defendant's purposeful activity or contacts that "forewarn[ ] [the defendant] of the possibility of a suit in the forum." *Id.* The defendant need not have physical contacts with the forum as long as the defendant's efforts are "purposefully directed" toward the forum residents. *Burger King Corp.*, 105 S.Ct. at 2184 (citing *Hirsch v. Blue Cross, Blue Shield*, 800 F.2d 1474, 1478 (9th Cir. 1986)). When analyzing minimum contacts, the Court must focus on "the relationship

among the defendant, the forum and the litigation." *Keeton*, 104 S.Ct. at 1478 (citing and quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). Further, each defendant's contact with the forum must be assessed individually. *Calder*, 104 S.Ct. at 1487. With these standards in mind the Court turns to the parties' claims.

I. Minimum Contacts

The defendants argue that their respective roles in the creation of the book did not bring them in contact with New Hampshire and that they did not control the distribution of the book. Specifically, Todd Gold argues that his research and writing activities took place in California, and that he did not control the final, edited version or the publishing and distribution of the book. It was the intervening activities of third persons, Gold argues, which caused the book to be distributed in New Hampshire. In addition, Gold contends that his actions relating to the book are precluded by the "fiduciary shield doctrine" from being used to assert jurisdiction over him individually as his activities were performed on behalf of B & G, his employer.

Brian Wilson argues that mere media interviews promoting the book, which were given outside of the forum state but possibly airing on New Hampshire stations, are not activities that were "purposefully directed" toward New Hampshire. Like Gold, Wilson also argues that he did not have any control over the publishing and distribution decisions regarding the book. Further, Wilson asserts that if, as the plaintiffs state in their writ, Eugene

Landy had complete control over Brian Wilson, then Wilson could not have co-authored the book.

B & G argues that it merely contracted with HarperCollins for publication and distribution, and that this contract reveals that HarperCollins had sole control over distribution decisions. Eugene Landy, who is appearing *pro se*, in his affidavit in support of the motion to dismiss joining with the above named defendants, stated generally that he does not have any contacts with New Hampshire.

Specific Jurisdiction Analysis

1. "Arose out of or Relating to" Requirement

With respect to the first specific jurisdiction requirement for minimum contacts, *see Ticketmaster*, 26 F.3d at 206, the Court finds and rules that the present cause of action "arose out of or is related to" each defendant's activities relating to the book, which constitutes the requisite contact with New Hampshire. Specifically, each defendant's alleged authorship, in whole or in part, of the book which was distributed in New Hampshire was the catalyst in this cause of action for defamation and the other counts intrinsically related thereto. That the actions causing the effects in New Hampshire were performed in California or another foreign state does not preclude jurisdiction as long as the cause of action arose out of these "effects." *See Calder*, 104 S.Ct. at 1485. Thus the crucial issue is whether each defendant "purposefully availed" it/himself of New Hampshire the forum state.

The primary overarching factor which controls this analysis is whether, because of the nature of the conduct at issue, each defendant must have reasonably expected to be haled into the forum state's court to answer for such conduct.

2. "Purposeful Availment" Requirement

As alleged authors or editors of the offending book which was, upon reasonable inference, intended for national distribution, each defendant could reasonably have foreseen that "Wouldn't It Be Nice" would be distributed and, thus, publicized in New Hampshire. However, mere foreseeability is not enough; each defendant's conduct with respect to the book must have been "purposefully directed" at New Hampshire.

"Purposefully Directed" Law and Analysis

The Court notes, and the defendants admit, that the cases primarily relied upon when asserting lack of personal jurisdiction due to insufficient "purposefully directed" conduct are non-libel cases, whereas the cases relied upon by the plaintiffs (*Keeton, Calder* and *Buckley, infra*) are all multi-state libel cases. Because the tort of libel is distinct in nature, the Court finds that the multi-state libel cases, even if not directly on point, are dispositive on the personal jurisdiction issue.

In *Keeton*, the United States Supreme Court held that, in a suit for multi-state libel, the New Hampshire District Court could exercise personal jurisdiction over Hustler

Magazine, Inc., a foreign corporation, because it had sufficient minimum contacts with the forum. *Keeton*, 104 S.Ct. at 1478. Specifically, the court held that the corporation's monthly sales of thousands of magazines in the forum could not constitute random isolated or "fortuitous contact," but was "purposefully directed" at the forum with inevitable effects on citizens of the forum state. *Id.* Further, it was this contact with the forum out of which the libel suit arose. *Id.* at 1481.

Though the *Keeton* defendant was the *publisher* of the defamatory material, the *Calder* court held that the forum state (California) could exercise personal jurisdiction over a non-resident *reporter* and *editor* of an alleged defamatory article appearing in the "National Enquirer," which had been distributed and sold in the forum and nationally. *Calder*, 104 S.Ct. at 1488. When subjecting the defendants to personal jurisdiction the *Calder* court relied upon the fact that the plaintiff was a resident of the forum state and that the defendants must have known that the brunt of the injury would occur in the forum due to her residency; thus, these circumstances predicated the conclusion that the defendants must have reasonably anticipated being haled into the forum's court. *Id.* at 1487. However, it was these facts which aided the court's ultimate finding that the "jurisdiction over petitioners in California is proper because of their *intentional conduct* in Florida *calculated* to cause injury to respondent in California." *Id.* at 1488; *see also Lex Computer*, 676 F.Supp. at 404-05 (the court interprets *Calder* in a similar manner.)

Residency in and the brunt of the harm occurring in the forum state, however, are not necessary to create sufficient "minimum contacts." *See Keeton*, 104 S.Ct. at

1481 (holding that, though the bulk of the injury did not occur in the forum and that this will be true in most libel actions, "there is no justification for restricting libel actions to the plaintiffs forum."). Thus, the plaintiffs' lack of residence in the forum state will not defeat jurisdiction if each defendant has sufficient contacts with New Hampshire. *See id.*

In *Buckley*, when defending against a multi-state libel action, the defendants argued that *Calder* precluded the exercise of jurisdiction as the alleged defamatory material was not aimed at the forum and the brunt of the injury did not occur in the forum as the plaintiff was not a resident-thereof. The defendants here make the same argument. The *Buckley* court rejected this argument, holding that such factors were merely coincidental to the *Calder* plaintiff's residency in the forum state. *Buckley*, 762 F.Supp. at 438. Instead, though none of the parties had any connection with the forum, the *Buckley* court ultimately determined that sufficient minimum contacts existed. *Id.* at 438-39. Specifically, the court held that, because the libelous conduct was aimed at the plaintiff and injury occurred wherever the defamatory material was distributed, the defendants, "all of whom had a direct hand in the writing and publication of the articles . . . for a nationally distributed magazine, must [have] reasonably anticipated being haled into court . . . where injury to the targeted plaintiff can be expected to occur." *Id.* This Court agrees with the *Buckley* court's rationale and, therefore, rejects the defendants' similar argument.

The defendants attempt to distinguish *Buckley* due to the court's finding that each defendant had a "direct hand in the writing and publication" of the offending

material, whereas the defendants here are merely alleged to have been involved with the writing, not the publication, of "Wouldn't It Be Nice." However, the *Buckley* court focused on the defendants' conduct being aimed specifically at the plaintiff and the fact that libel injury occurs wherever the publication circulates to support the essential finding that the defendants must have reasonably expected to defend a libel suit in the forum. *Id.* at 938. Moreover, that the editor and reporter defendants in *Calder* were not involved in the publication of the offending article did not prevent the *Calder* court from concluding that the defendants must have reasonably expected to be compelled to defend a libel suit in the forum state where injury occurred. *Calder*, 104 S.Ct. at 1497-88.

The defendants also contend that this case is analogous to the facts in *Wilson* and *Ticketmaster* in which each court held that the exercise of personal jurisdiction over the "journalistic source" defendants would violate Due Process. *Wilson* and *Ticketmaster* have similar facts in that the non-resident defendant responded to an uninitiated and unsolicited phone interview by a reporter. The defendants made statements which were ultimately published and a defamation suit was subsequently filed where the article was published.

The *Ticketmaster* court found that the defendant's contacts were too "attenuated by the intervening activities of third parties, e.g. the reporter, the editor [and] the media, outlet." *Ticketmaster – N.Y., Inc.*, 26 F.3d at 207. The form and tone of the article were not within the defendant's effective control. *Id.* Further, with respect to "purposeful availment," the court found that the defendant's contacts were not voluntary as it was the reporter, not the

defendant, who initiated the unsolicited interview. *Id.* at 208. However, the court indicated that if the "journalistic source" had initiated the contact with the reporter and the resulting injury was foreseeable, the exercise of personal jurisdiction may be appropriate. *Id.*

The *Wilson* court relied upon similar distinctions when holding that the non-resident defendants, who also were the targets of unsolicited and uninitiated phone interviews, did not have sufficient minimum contacts to justify the exercise of jurisdiction. *Wilson v. Belin*, 20 F.3d 644, 648-49 (5th Cir. 1994). Specifically, when distinguishing *Calder*, the court held that the defendants did not write or devise the story, did not do research, were not paid for their comments, and their comments were not part of a planned business venture; all of which the court assessed to be the dispositive facts in *Calder*. *Wilson*, 20 F.3d at 648. Instead, the court determined that responding to an uninitiated and unsolicited phone call is not a "purposefully directed" activity such that sufficient minimum contacts exist. *Id.* at 649. The "purposefully directed" standard thus defined, the Court next addresses each defendant's conduct.

a. Brian Wilson, Eugene Landy and Todd Gold

As alleged in the plaintiffs' writ and taking all reasonable inferences therefrom as true, the book at issue was co-authored by Brian Wilson and Todd Gold. *See* Plaintiffs' *Verified Complaint* at paras. 1, 18, 19, 23, and 25. Also, the Court notes that the cover of "Wouldn't It Be Nice" purports that it was authored by "Brian Wilson with Todd Gold." In addition, the plaintiffs allege that

Eugene Landy was intrinsically involved with the creation, writing and editing of the book. *See id.* at paras. 1, 17, 18, 25.

Each defendant materially took part in a planned business venture to create and distribute for sale the book at issue. Pursuant to *Ticketmaster* and *Wilson*. Gold, Wilson and Landy are each more analogous to the actual reporter or editor of the defamatory material rather than the typical "journalistic source," whose involvement is involuntary, unsolicited and passive. Indeed, Brian Wilson is alleged to have directly contributed to and to be taking credit for the authorship of the book. The allegation that Landy controlled Wilson does not eliminate Wilson's individual contribution to the book. According to the writ, Eugene Landy not only initiated the creation of the book but also was alleged to have "shaped, revised and edited" the book. As alleged, Todd Gold researched and wrote the book. Gold's assertion that he had no understanding of where the book would be distributed is disingenuous, as the Collaboration Agreement between him and B & G states that Gold's services were to continue "until general release of the autobiography through normal retail channels in the United States." Plaintiff's *Exhibit 1*, para. 2, p. 1. Unlike the *Ticketmaster* defendant, the allegations in the writ and accompanying documentation sufficiently contend that the form and tone of the book were directly within the control of Gold and Landy.

Additionally, Landy filed a General Appearance on December 12, 1994, thereby confessing to the jurisdiction of the Court, notwithstanding his attempt to join in the Motion to Dismiss for lack of jurisdiction filed by the other defendants. The filing of a General Appearance

constitutes a waiver of all objections to the jurisdictions of the Court over the person. *Woodbury v. Swan*, 58 N.H. 380, 383 (1878); *Lachapelle v. Town of Goffstown*, 134 N.H. 478, 480 (1991).

Gold raises the "fiduciary shield" doctrine as an additional argument in support of his position. According to this doctrine, a corporate employee or officer's mere association with a corporation whose acts cause injury in the forum cannot be the basis of asserting personal jurisdiction over the individual. *Estabrook v. Witmore*, 129 N.H. 520, 523 (1987); *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 906 (1st Cir. 1980). However, an individual employee or agent can be subject to personal jurisdiction for corporate acts if the individual can incur personal liability for his/her acts in the forum. *Williams Electric Co. v. Honeywell, Inc.*, 854 F.2d 389, 392 (11th Cir. 1988). An agent is liable for torts in which he/she had direct and personal participation regardless of whether such acts were performed within the scope of authority. *Escude Cruz*, 619 F.2d at 907. Further, in both *Calder* and *Buckley*, the individual defendants were subject to personal jurisdiction in the forum even though the defamation suit arose from their activities performed pursuant to their employment.

Here, the Collaboration Agreement between B & G and Todd Gold reflects that Gold was an independent contractor rather than an employee. *See* Plaintiff's *Exhibit 1*, 11b, p. 6. Further, pursuant to *Escude Cruz*, because Todd Gold had direct and personal involvement with the authorship of "Wouldn't It Be Nice" (as outlined above), the fiduciary shield doctrine does not preclude the Court

from exercising personal jurisdiction over him individually.

b. Brains and Genius, Partnership

With respect to B & G's contacts with New Hampshire, the plaintiffs allege in their writ that "through its involvement with the publication of the book in New Hampshire and across the country, defendant Brains and Genius has transacted business and committed tortious acts within the State of New Hampshire." *See* Plaintiffs' *Verified Complaint* at para. 8. While mere conclusory statements are not enough to support a motion to dismiss, *see Jay Edwards, Inc.*, 130 N.H. at 45, the Court can go beyond the pleadings to review affidavits and other evidentiary material when personal jurisdiction is challenged, *see Lex Computer*, 676 F.Supp. at 402.

In their writ, the plaintiffs also allege that Landy made all of the business decisions of B & G. *See* Plaintiffs' *Verified Complaint* at para 18. Thus, upon reasonable inference, all of Landy's actions alleged in the writ may be attributable to the partnership as well. Also, as reflected in the agreement between B & G and Harper & Row, Publishers, Inc., (presumably a subsidiary of HarperCollins, *see* Defendants' *Memorandum of Law* at 33), for the printing, publication and selling of "Wouldn't It Be Nice," all material changes to the book were subject to the approval of B & G. *See* Plaintiffs' *Exhibit 2* at para. 3, p. 2. Further, the defendants admit that B & G contracted with HarperCollins to publish and distribute the book, *see* Defendants' *Memorandum of Law in Support of Motion to Dismiss for Lack of Personal Jurisdiction* at 33, and that B &

G hired Todd Gold to write the book, (admitted at the 2/10/95 hearing). Therefore, B & G was personally, intentionally and directly involved with the editing and publication of the book at issue.

c. Analysis and Conclusion applicable to all Defendants

Contrary to the defendants' contention, whether or not each defendant's active involvement with the book ended prior to actual publication is irrelevant. Other parties (e.g. HarperCollins) having the active role of publishing and distributing the book does not diminish each defendant's alleged distinct and significant contribution to the creation of the purported defamatory material. The conduct of each defendant as author/editor and of HarperCollins as publisher and distributor are mutually exclusive. The Calder court did not hold and this Court declines to find that a third party's publishing and distributing activities supercede and alleviate a defendant's direct and intentional involvement with purported defamatory material.

Like the author and editor defendants in *Calder*, the defamatory material contained in "Wouldn't It Be Nice" was "directly aimed" at the plaintiffs. Unlike the *Ticketmaster* defendant, each defendant here was intentionally and actively involved in the writing or editing of the book. Because the injury resulting from the alleged defamatory material occurs wherever the publication is circulated and the defamatory material at issue was "directly aimed" at the plaintiffs, who are alleged to have an established nationwide reputation (including within

New Hampshire), each defendant's intentional and active involvement with "Wouldn't It Be Nice" was calculated to cause the plaintiffs injury in New Hampshire. *See Calder*, 104 S.Ct. at 1487-88. Accordingly, the Court finds that each defendant had sufficient "minimum contacts" with New Hampshire so as to reasonably expect to be haled into a New Hampshire court.

II. Fair Play and Substantial Justice

The defendants also argue that, even,if there are sufficient minimum contacts, forcing them to defend this suit in New Hampshire "would offend traditional notions of fair play and substantial justice." Specifically, the defendants contend that it would be a burden for the defendants and the witnesses to travel 3,000 miles to participate in the suit. Also, the defendants assert that New Hampshire does not have a genuine interest in providing a forum for this litigation in light of the plaintiffs having allowed the California statute of limitations to run and that the vast majority of the other states' collective interest is against New Hampshire exercising jurisdiction, given their short statute of limitations.

Although each defendant has sufficient minimum contacts with New Hampshire, whether this Court's exercise of jurisdiction would offend "traditional notions of fair play and substantial justice" requires separate analysis. *Burger King Corp.*, 105 S.Ct. at 2184. When determining the reasonableness of exercising jurisdiction, the court may evaluate the following "gestalt factors": (1) the burden on the defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in

adjudicating the dispute; (4) the plaintiff's interest in obtaining convenient and effective relief; (5) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (6) the shared interest of the several states in furthering substantive social policies. *Id.* at 2184 (citing and quoting *World-Wide Volkswagen Corp.*, 100 S.Ct. 559, 564 (1980)); *Ticketmaster – N.Y., Inc.*, 26 F.3d at 209. However, it is only in "very close cases" where the "gestalt factors" may be applied to negate the exercise of jurisdiction due to unreasonableness, despite a finding of sufficient minimum contacts. *Ticketmaster – N.Y., Inc.*, 26 F.3d at 209 (noting that the "gestalt factors" have been used by the United States Supreme Court only once, *see Asahi Metal Industry Co. v. California*, 107 S.Ct. 1026 (1987), and only regularly applied to defeat jurisdiction by the Ninth Circuit Court of Appeals. The *Ticketmaster* court adopted the Ninth Circuit's reasoning.).

Contrary to the defendants, assertion, the State of New Hampshire has a significant interest in providing a forum for this litigation. Notwithstanding that the tort of libel/defamation results in injury wherever the material is circulated and "Wouldn't It Be Nice" is alleged to have been distributed in New Hampshire where the plaintiffs are alleged to have an established reputation, New Hampshire has a significant interest in protecting its citizens from deceit. *Keeton*, 104 S.Ct. at 1479. Further, that New Hampshire provides a longer statute of limitations is a choice of law inquiry and is irrelevant to the personal jurisdiction analysis of each defendant's contacts with the forum. *See id.* at 1480. In fact, the New Hampshire Supreme Court has specifically held that the length of the statute of limitations for libel reflects the balance the state

legislature deemed appropriate with respect to the interests of the courts, defendants and plaintiffs. *Keeton v. Hustler Magazine, Inc.*, 131 N.H. 6, 16 (1988). That other states have devised different time limits for libel suits is irrelevant as it is almost impossible to discern the other states' rationale supporting their set time limits. *See id.* Further, the Court notes that the current disparity between other states and New Hampshire's statute of limitations for libel was far more significant when *Keeton* was decided (i.e. one year versus six years) than it is with respect to the current litigation (i.e. one year versus three years).

Finally, relying upon *Ticketmaster* and *Asahi*, the defendants argue that the burden on them to defend and on the witnesses to testify in a trial in New Hampshire, which is approximately 3,000 miles away, is egregious. However, the *Ticketmaster* court gave the "gestalt factors" dispositive weight due to the "minimally sufficient showing of relatedness and purposefulness" of the defendant's contacts with the forum, *see Ticketmaster*, 26 F.3d at 210, and the *Asahi* court had a divided court on the "minimum contacts" issue, *see Asahi*, 107 S.Ct. 1026 (1987). Here, the Court's finding of sufficient minimum contacts is not marginal, but is based upon each defendant's independent, significant involvement with the book at issue, which was, from reasonable inference, expected and intended to be nationally distributed. Further, the defendants' burden of traveling to New Hampshire is no greater than the plaintiffs' burden in maintaining their suit in this forum. Therefore, compelling each defendant

to defend in the forum state's court is not so unreasonable as to offend traditional notions of fair play and substantial justice.

For the foregoing reasons, the Court finds that each defendant has "sufficient minimum contacts" with the state of New Hampshire such that require each to defend the present litigation here does not offend "traditional notions of fair play and substantial justice." Accordingly, the Court DENIES the defendants' motions to dismiss for lack of personal jurisdiction.

B. Motion to Dismiss for Failure to State a Cause of Action

Defendant HarperCollins filed a motion to dismiss the plaintiffs' writ for failure to state a cause of action upon which relief can be granted. The other defendants, excluding Eugene Landy, have indicated that, should their motion to dismiss for lack of jurisdiction be denied (as it is in part A hereof), it is their intention to file a motion to dismiss asserting arguments similar to those asserted by HarperCollins in its motion.

In the interest of judicial economy and to obviate duplication, ruling on HarperCollins' motion to dismiss is deferred pending submission by the remaining defendants of their motion(s) to dismiss and supporting memoranda of law. The Court ORDERS that the defendants, excluding HarperCollins, file such motions and memoranda in support thereof not later than thirty days from the date of this order. Plaintiffs shall have thirty days from the date of the filing thereof to respond to such motion(s) at which time the Court may order such further

hearing as it deems necessary in order to address the issues raised by all the motions.

So ordered.

March 1, 1995

/s/ Walter L. Murphy
Walter L. Murphy
Presiding Justice

**BROTHER RECORDS, INC. and another.**

**v.**

**HARPERCOLLINS PUBLISHERS and another.**

**No. 95-214.**

Supreme Court of New Hampshire.

Sept. 25, 1996.

Parties associated with musical group "The Beach Boys" brought libel action against authors of autobiography of one of the group's founding members and partnership that hired one of the authors and arranged for book's publication. The Superior Court, Hillsborough-Southern Judicial District, Murphy, J., denied defendants' motions to dismiss for lack of personal jurisdiction, and they appealed. The Supreme Court, Horton, J., held that: (1) defendants had sufficient minimum contacts with New Hampshire to support exercise of personal jurisdiction, and (2) exercising personal jurisdiction over defendants did not offend notions of fair play and substantial justice.

Affirmed.

Upton, Sanders & Smith, Concord (Kimberly Kirkland, on the brief) and Flynn, Sheridan & Tabb, Boston, Massachusetts (Michael Tabb, on the brief and orally), for plaintiffs.

Gagliuso & Gagliuso, P.A., Nashua (Richard C. Gagliuso and Kelly J. Gagliuso, on the brief, and Mr. Gagliuso orally), for defendants Brian D. Wilson, Todd Gold, and Brains and Genius.

HORTON, Justice.

Three of the defendants, Brian D. Wilson, by and through the conservator of his estate and person (Wilson), Todd Gold (Gold), and Brains and Genius (B & G), who will be collectively referred to as "the defendants," appeal the order of the Superior Court (Murphy, J.) denying their motions to dismiss. We affirm.

This case arises out of the publication of the book Wouldn't It Be Nice, published by HarperCollins Publishers and written by defendants Wilson and Gold. The book is an autobiography of Wilson, one of the founding members of the music group, The Beach Boys. The plaintiffs, Alan Jardine, Brother Records, Inc., and Brother Tours, Inc., sued HarperCollins Publishers, Eugene Landy, and the defendants in superior court alleging libel and related torts. Jardine is a member of The Beach Boys. Brother Records, Inc. and Brother Tours, Inc. are the two California corporations through which the Beach Boys conduct business. Landy is a psychologist who treated Wilson for many years. B & G, which owns the copyright to the book, is a California partnership consisting of Wilson and Landy. It hired Gold to write the manuscript and selected HarperCollins to publish the book.

The defendants appeared specially and moved separately to dismiss for lack of personal jurisdiction. They argued that New Hampshire has virtually no connection with the parties or the subject matter of the action and that they lacked contacts with New Hampshire sufficient to justify the exercise of jurisdiction over them by the superior court. The superior court ruled that each defendant had sufficient "minimum contacts" with New

Hampshire such that the State's exercise of jurisdiction over them would not offend "traditional notions of fair play and substantial justice." Internat. Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945); see Phelps v. Kingston, 130 N.H. 166, 170, 536 A.2d 740, 742 (1987). The defendants appealed.

A court's exercise of personal jurisdiction over a foreign defendant typically implies a two-part inquiry. Jurisdiction must be authorized, first, under the State's long-arm statute, and second, under the due process clause of the fourteenth amendment to the United States Constitution. See Weld Power Industries v. C.S.I. Technologies, 124 N.H. 121, 125, 467 A.2d 568, 570 (1983). Because the defendants concede that they fall within the bounds of New Hampshire's long-arm statute applicable to individual foreign defendants, see RSA 510:4, I (1983), we need only determine whether the "assertion of jurisdiction is consistent with the due process, or minimum contacts, requirements of the United States Constitution." Buckley v. McGraw-Hill, Inc., 762 F.Supp. 430, 436 (D.N.H.1991); see Phelps, 130 N.H. at 170, 536 A.2d at 742. Our inquiry is guided by the United States Supreme Court:

> The Due Process Clause of the Fourteenth Amendment to the United States Constitution permits personal jurisdiction over a defendant in any State with which the defendant has "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' Milliken v. Meyer, 311 U.S. 457, 463 [61 S.Ct. 339, 342, 85 L.Ed. 278] [(1940)]." International Shoe. In judging minimum contacts, a court properly

> focuses on "the relationship among the defendant, the forum, and the litigation." Shaffer v. Heitner, 433 U.S. 186, 204 [97 S.Ct. 2569, 2579, 53 L.Ed.2d 683] (1977). See also Rush v. Savchuk, 444 U.S. 320, 332 [100 S.Ct. 571, 579, 62 L.Ed.2d 516] (1980). The plaintiff's lack of "contacts" will not defeat otherwise proper jurisdiction, see Keeton v. Hustler Magazine, Inc., [465 U.S. 770, 779-81, 104 S.Ct. 1473, 1480-81, 79 L.Ed.2d 790 (1984)], but they may be so manifold as to permit jurisdiction when it would not exist in their absence.

Calder v. Jones, 465 U.S. 783, 788, 104 S.Ct. 1482, 1486, 79 L.Ed.2d 804 (1984).

"The plaintiff[s] bear[s] the burden of demonstrating facts sufficient to establish personal jurisdiction over the defendant[s]." Phelps, 130 N.H. at 170, 536 A.2d at 742 (emphasis added). This holds true despite the general rule for dismissal on failure to state a claim that "on a motion to dismiss, all facts properly pleaded by the plaintiff are deemed true, and all reasonable inferences derived therefrom are construed most favorably to the plaintiff." Weld Power Industries, 124 N.H. at 123, 467 A.2d at 569. Thus, when jurisdictional facts are challenged, see, e.g., Venetian Salami Co. v. Parthenais, 554 So.2d 499, 502 (Fla.1989), "[p]laintiffs must not only plead facts sufficient to support jurisdiction, but must also go beyond the pleadings and make affirmative proof." Lex Computer & Mgmt. v. Eslinger & Pelton, P.C., 676 F.Supp. 399, 402 (D.N.H.1987); see, e.g., Foster-Miller, Inc. v. Babcock & Wilcox Canada, 46 F.3d 138, 145-47 (1st Cir.1995).

"However, plaintiffs need make only a prima facie showing of jurisdictional facts to avoid defendants' motion to dismiss." Lex Computer, 676 F.Supp. at 402.

I. Minimum Contacts

" 'Each defendant's contacts with the forum state must be assessed individually.' " Estabrook v. Wetmore, 129 N.H. 520, 524, 529 A.2d 956, 959 (1987) (quoting Calder, 465 U.S. at 790, 104 S.Ct. at 1487). In order for the exercise of jurisdiction to be proper, the nature of those contacts must be "such that it is 'reasonable' and 'fair' " to subject the defendant to the court's jurisdiction. Tavoularis v. Womer, 123 N.H. 423, 426-27, 462 A.2d 110, 113 (1983). The contacts are sufficient if the defendant's activity outside the State had "reasonably foreseeable consequences within the forum State," id. at 427, 462 A.2d at 113, and if "it was reasonably foreseeable that the defendant would be sued in New Hampshire," id. at 428, 462 A.2d at 113-14. The defendants' contacts thus warn them of the possibility of a law suit. The contacts must, however, be more than fortuitous, id. at 427, 462 A.2d at 113; see World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295, 100 S.Ct. 559, 565, 62 L.Ed.2d 490 (1980); they must be "purposefully directed toward the forum State," Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 112, 107 S.Ct. 1026, 1032, 94 L.Ed.2d 92 (1987) (emphasis omitted); see Burger King v. Rudzewicz, 471 U.S. 462, 472, 105 S.Ct. 2174, 2181, 85 L.Ed.2d 528 (1985); Phelps, 130 N.H. at 172, 536 A.2d at 743. In other words, the defendants must have "purposefully avail[ed themselves] of the privilege of conducting activities within the forum state." Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228,

1239, 2 L.Ed.2d 1283 (1958). In addition, in the absence of "continuous and systematic" contacts with the forum state, Perkins v. Benguet Mining Co., 342 U.S. 437, 438, 72 S.Ct. 413, 414, 96 L.Ed. 485 (1952), the controversy must arise out of the defendants' contacts with the forum. Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414-16, 104 S.Ct. 1868, 1872-73, 80 L.Ed.2d 404 (1984). "When a non-resident defendant performs allegedly tortious acts in New Hampshire, little doubt clouds a finding that New Hampshire has jurisdiction." Estabrook, 129 N.H. at 523, 529 A.2d at 958.

The defendants argue that the plaintiffs failed to demonstrate sufficient contacts between the defendants and New Hampshire because the plaintiffs failed to show that the defendants purposefully directed their activities at New Hampshire. They argue that the trial court failed to recognize the distinction between foreseeable consequences of the defendants' actions and purposefully directed actions.

Specifically, Wilson argues that his involvement with the book was extremely limited: he participated in thirty to forty hours of interviews with Gold and skimmed through a draft of the book prior to publication. He also argues that promotional media interviews which may have aired in New Hampshire were not activities related to the libel claim and, therefore, are not part of the jurisdictional analysis. He maintains that under the plaintiffs' version of the facts, he was manipulated by others and, therefore, could not have purposefully directed his activity toward New Hampshire.

Gold argues that after researching and writing the manuscript, his role was limited to incorporating comments made by Landy and Wilson. He states that his work on the book took place entirely in California and did not bring him into contact with New Hampshire, that the people and events about which he wrote did not involve New Hampshire, and that he could not have anticipated that any injury caused by his conduct would have occurred in this State. He further argues that the distribution and sale of the book in New Hampshire was controlled by HarperCollins and that he played no role in the selection of a publisher or the decisions of where and when to publish.

B & G argues that the only demonstrated details of its involvement with the book are contained in collaboration and publication agreements. The agreements show that B & G hired Gold to write the manuscript over which B & G retained control and that the details of publication, distribution, and promotion would be determined by HarperCollins. B & G challenges the court's inference that Landy's activities were attributable to the partnership and argues that any relevant acts directed at New Hampshire were undertaken by HarperCollins rather than by B & G.

In this case, the plaintiffs demonstrated that the defendants purposefully directed their activities at New Hampshire residents. Wilson is credited with authorship on the cover of the book. The manuscript is based on interviews with him, and he had the discretion, under the terms of the collaboration agreement, to make "changes, additions, and eliminations" as he desired or deemed necessary. The agreement specified that the book would

be released "through normal retail channels in the United States," and the agreement was signed by Gold and Wilson. In addition, Wilson was contractually bound to participate in a nationwide promotional tour which was to include appearances on "major network TV shows and at the American Booksellers Association convention." Moreover, Wilson acknowledged that he was personally bound by the publishing agreement and that he was "personally responsible for the performance of the Partnership."

Gold researched and wrote the manuscript and incorporated changes made by Wilson and Landy. The collaboration agreement between Gold and B & G specifies that his services would be required until the book's general release "throughout the United States through normal retail channels."

B & G hired Gold to prepare the manuscript and contracted with HarperCollins to publish the book. Under the terms of the collaboration agreement, all services performed by Gold were to be done under B & G's direction and supervision, and drafts of the book were to be submitted to it and were subject to its approval. Pursuant to the publishing agreement, B & G retained the right to review proofs and other production materials prior to publication. B & G granted HarperCollins the exclusive right to "print, publish and sell [the book] . . . throughout the United States, its territories, dependencies and possessions, Canada, [and] the Philippine Islands." In short, B & G maintained exclusive control over every aspect of the project.

The defendants are the parties directly responsible for the content of the book. The facts in this case are quite unlike those in Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201 (1st Cir.1994), a case on which the defendants rely. The defendant in Ticketmaster was a "journalistic source" and not the author of the offending work. Id. at 203-04. The court stated that

> when the defendant in a defamation action is a journalist's source, the link between the defendant's conduct and the cause of action is attenuated by the intervening activities of third parties, e.g., the reporter, the editor, the media outlet, and that those intermediaries shape, amplify, and occasionally distort the original utterance.

Id. at 207. Here, in contrast, Gold and Wilson are the authors of the book and were hired by B & G, which had control over the project.

The defendants' ultimate goals regarding the book included nationwide distribution and sale. The book was intended for fans who collectively had purchased over 200,000,000 Beach Boys albums during the past three decades. This market included New Hampshire, where the Beach Boys had performed several times in recent years. Moreover, the parties agree that the book was distributed and sold in New Hampshire. "It is undoubtedly true that the bulk of the harm [allegedly] done to [the plaintiffs] occurred outside New Hampshire. But that will be true in almost every libel action brought somewhere other than the plaintiff[s'] domicile. There is no justification for restricting libel actions to the plaintiff[s'] home forum." Keeton, 465 U.S. at 780, 104 S.Ct. at 1481.

Here, the defendants deliberately exploited the New Hampshire market. See id. at 781, 104 S.Ct. at 1481. Each knew the book would be distributed and sold nationally, and each stood to profit from the sale of books in New Hampshire.

II. Fair Play and Substantial Justice

In addition to determining whether minimum contacts exist, the court must determine whether these contacts, in light of other factors, justify the exercise of personal jurisdiction such that traditional notions of "fair play and substantial justice" are not offended. Burger King, 471 U.S. at 476, 105 S.Ct. at 2027; see Phelps, 130 N.H. at 172, 536 A.2d at 742. Thus the court may consider

> the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff[s'] interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.

Phelps, 130 N.H. at 172, 536 A.2d at 743 (quotations omitted). These "gestalt factors," Kopf v. Chloride Power Electronics, Inc., 882 F.Supp. 1183, 1195-96 (D.N.H.1995); Ticketmaster, 26 F.3d at 209-10, "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." Phelps, 130 N.H. at 172, 536 A.2d at 743 (quotation omitted).

The defendants argue that even if sufficient contacts exist, New Hampshire's exercise of jurisdiction over them would violate the due process clause. The Supreme Court has held, however, that a State's interest in adjudicating a dispute extends to libel actions brought by nonresidents because libel harms "both the subject of the falsehood and the readers of the statement." Keeton, 465 U.S. at 776, 104 S.Ct. at 1478. Thus "New Hampshire may rightly employ its libel laws to discourage the deception of its citizens," id., even in order to remedy "the injury that in-state libel causes within New Hampshire to a non-resident," id. at 776-77, 104 S.Ct. at 1478-79.

> The tort of libel is generally held to occur wherever the offending material is circulated. The reputation of the libel victim may suffer harm even in a State in which he has hitherto been anonymous. The communication of the libel may create a negative reputation among the residents of a jurisdiction where the plaintiff's previous reputation was, however small, at least unblemished.

Id. at 777, 104 S.Ct. at 1479 (citation and footnote omitted).

This principle applies to the facts of this case. That the parties have no apparent connections to New Hampshire does not mean that the plaintiffs did not suffer injury in New Hampshire. See Buckley, 762 F.Supp. at 438. "The individual defendants, all of whom had a direct hand in the writing and publication of [a nationally distributed book], must reasonably anticipate being haled into court in a libel action where injury to the targeted

plaintiff[s] can be expected to occur, which in this case included New Hampshire." Id. at 438-39.

Due to the nature of the claim of libel, and because we find that the defendants' activities were purposefully directed at New Hampshire, the superior court's jurisdiction over the defendants comports with "traditional notions of fair play and substantial justice." Accordingly, we find that the trial court's denial of each defendant's motion to dismiss was not in error.

Affirmed.

All concurred.

STATE OF NEW HAMPSHIRE
Southern District of Hillsborough County

SUPERIOR COURT No. ___

**WRIT OF SUMMONS** ( ) COURT
(X) JURY

BROTHER RECORDS, INC., BROTHER TOURS, INC. and ALAN JARDINE

vs.

HARPERCOLLINS PUBLISHERS, a corporation; BRIAN D. WILSON, an individual, by and through Jerome S. Billet as Conservator of the Estate and Person of Brian D. Wilson; TODD GOLD an individual; EUGENE LANDY, an individual; BRAINS AND GENIUS, a California partnership of Eugene Landy and Brian D. Wilson; and DOES 1 through 50 inclusive.

To the Sheriff of any County or his Deputy:

WE COMMAND YOU TO SUMMON HARPERCOLLINS PUBLISHERS, BRIAN D. WILSON, TODD GOLD, EUGENE LANDY, BRAINS AND GENIUS and JEROME S. BILLET as Conservator of the Estate and Person of Brian D. Wilson if to be found in your precinct, to appear at the SUPERIOR COURT at NASHUA in said County of Hillsborough, on the first Tuesday of November 1994, to answer to the plaintiff(s). IN A PLEA OF

See Plaintiffs' Verified Complaint attached hereto and made a part hereof.

NOTICE

You do not have to physically appear in Court on the day specified in these papers since there will be no hearing on

that day. If you desire to be heard, you must notify the Court by filing an appearance with the Clerk of Court on or before the date specified on this writ. (Appearance forms are available at the Clerk's Office) Failure of any defendant to file an appearance form will result in a default judgment being entered against them.

To the damage of the plaintiff as he say the sum of dollars; and make return of this writ with your doings therein.

Witness Joseph P. Nadeau, Esquire, 13th day of Sept. A.D. 1994

BROTHER RECORDS, INC.
BROTHER TOURS, INC. AND
ALAN JARDINE Indorser

By /s/ Beth George-Kane /s/ Marshall A. Buttrick
Beth George-Kane Clerk of Superior Court
Attorney

SUPERIOR COURT OF NEW HAMPSHIRE

| HILLSBOROUGH COUNTY | CIVIL ACTION NO. |
|---|---|
| BROTHER RECORDS, INC., BROTHER TOURS, INC. and ALAN JARDINE<br>Plaintiffs<br>v.<br>HARPERCOLLINS PUBLISHERS, a corporation; BRIAN D. WILSON, an individual, by and through Jerome S. Billet as Conservator of the Estate and Person of Brian D. Wilson; TODD GOLD an individual; EUGENE LANDY, an individual; BRAINS AND GENIUS, a California partnership of Eugene Landy and Brian D. Wilson; and DOES 1 through 50 inclusive<br>Defendants | PLAINTIFFS' DEMAND A TRIAL BY JURY ON ALL COUNTS |

## VERIFIED COMPLAINT

### INTRODUCTION

1. In September, 1991, the defendants in this action were responsible for publishing "Wouldn't It Be Nice" (the "Book"), a book which purports to be the autobiography of Brian Wilson, one of the founders of the popular music group, The Beach Boys. Plaintiffs, Brother Records, Inc. and Brother Tours, Inc. (collectively "Brother") are the corporations through which The Beach Boys have done business from 1967 to the present. The Book purports to retell Wilson's relationship with The Beach Boys,

including the history of Brother's private, internal matters relating to Wilson and other members of The Beach Boys, and how many of The Beach Boys' greatest hits were created. Although the Book states that it is authored by defendant, Brian Wilson, with the assistance of defendant Todd Gold, in reality all of the defendants knew that the driving force behind the Book was defendant Eugene Landy, Wilson's defrocked psychologist. All of the defendants knew that Landy intensely disliked and had an axe to grind against The Beach Boys, that he was not an objective observer, that he had little actual knowledge of many of the events recounted in the Book, and that Landy sought to obtain control over Wilson. Indeed, prior to the publication of the Book, the defendants were warned by an attorney for one of the members of The Beach Boys, a shareholder of Brother, that the Book was probably inaccurate because defendant Brian Wilson was incompetent. Notwithstanding these warnings the defendants published the Book, distributing it throughout the nation. Many of the passages in the Book concerning The Beach Boys are false and are defamatory. One of the basic falsities of the Book lies in holding it out as Wilson's "autobiography," thereby lending it credence with the use of Wilson's name, when Defendants knew in fact that the Book was maliciously engineered by Landy. Plaintiffs bring this action for the damages they have suffered as a result or the defendants' publication of defamatory material.

PARTIES

2. Plaintiffs Brother Records, Inc. and Brother Tours, Inc. (collectively "Brother) are California corporations

which have a principal place of business in Los Angeles, California. Brother regularly receives income from New Hampshire as a result of Beach Boys concerts held in New Hampshire, Beach Boys recordings purchased in New Hampshire and royalties from Beach Boys recordings.

3. Plaintiff Alan Jardine ("Jardine") is a citizen of the United States with a usual residence in California. Jardine is, and at all relevant times has been, a member of The Beach Boys and a shareholder of Brother.

4. Defendant Brian Douglas Wilson ("Wilson") is a citizen of the United States residing in Los Angeles, California. On March 9, 1992 defendant Jerome S. Billet, a resident of Los Angeles County, California was appointed by the Los Angeles Superior Court as Conservator of the Person and the Estate of Brian Wilson. Through publication of the Book in New Hampshire and across the country, Defendant Wilson has transacted business and committed tortious acts within the State of New Hampshire.

5. Defendant HarperCollins Publishers ("HarperCollins") is, upon information and belief, a Delaware corporation with a usual place of business in New York, New York. Through publication of the Book in New Hampshire and across the country, Defendant HarperCollins has transacted business and committed tortious acts within the State of New Hampshire.

6. Defendant Todd Gold ("Gold") is an individual with a usual residence, upon information and belief, in Los Angeles County, California. Through his involvement with the publication of the Book in New Hampshire and

across the country, Defendant Gold has transacted business and committed tortious acts within the State of New Hampshire.

7. Defendant Eugene Landy ("Landy") is an individual who resides, upon information and belief, in Los Angeles County, California. Through his involvement with the publication of the Book in New Hampshire and across the country, Defendant Gold [sic] has transacted business and committed tortious acts within the State of New Hampshire.

8. Defendant Brains and Genius is a California partnership created by defendants, Eugene Landy and Brian Wilson. Through its involvement with the publication of the Book in New Hampshire and across the country, Defendant Brains and Genius has transacted business and committed tortious acts within the State of New Hampshire.

9. Defendants Does 1 through 50 are sued herein under fictitious names; the true names and capacities are not known at this time, but the prayer is made that the same may be inserted herein when ascertained. Plaintiffs are informed and believe and therefore allege that each of the defendants designated herein as a Doe is responsible in some manner for the events and happenings herein referred to, and proximately caused the damage to the plaintiffs as herein alleged. Through their involvement with the publication of the Book in New Hampshire and across the country, Defendants Does 1 through 50 have transacted business and committed tortious acts within the State of New Hampshire.

10. At all times herein, mentioned, each of the defendants,. including the fictitiously named defendants, was the agent and/or employee of the remaining defendants and in doing the things hereinafter alleged, was acting within the scope of such agency and employment.

## FACTUAL ALLEGATIONS

11. The Beach Boys are one of the most popular musical groups in American history. Founded in 1961, The Beach Boys are still actively recording and performing throughout the world today. They have had dozens of hit records and sold millions of copies of their recordings. The Beach Boys tour extensively, and receive substantial performance royalties and payments from their recording contracts. Brother, the corporate entity through which The Beach Boys conduct their business, receives millions of dollars in revenue annually as a result of The Beach Boys' activities and royalty contracts. Brother is a closely held corporation, equally held by the four surviving members of The Beach Boys, one of whom is defendant Wilson. At all relevant times herein, defendant Wilson has been a director of Brother.

12. During the 1960's, defendant Wilson was a vital member of The Beach Boys. Wilson, together with the other members of The Beach Boys, wrote The Beach Boys' greatest hits during the 1960's, and together they produced many of their finest records. Wilson also performed live with the band, at least through 1964. Wilson has admitted that in the 1960's The Beach Boys worked together as a team in the creation and production of their music. Although Wilson made critical contributions to

The Beach Boys' songs in the 1960's, Wilson's contribution to their live performances after the 1960's, one of the key reasons why The Beach Boys have enjoyed such longevity in a business known for constant turn over, was secondary. The unique Beach Boys sound was something all of the members of the group helped to create. Indeed, after 1964, Wilson rarely toured with the band.

13. As a result of severe psychological problems, since 1964 Wilson has been emotionally and mentally incapable of touring regularly with The Beach Boys. Additionally, since 1969, Wilson has created very little music for the band. Yet, notwithstanding Wilson's severe illnesses, his lack of productivity, and his inability to perform regularly with the band, until 1992, The Beach Boys continued to pay Wilson his 25% share of Brother profits, embrace him as a partner and friend, support his medical treatment, and encourage him to compose music. In the 70's, 80's and 90's, Brother has paid Wilson millions of dollars, much of it for songs, recordings and concerts in which Wilson had little or no involvement as a performer or producer.

14. In 1976, and again in 1982, The Beach Boys, in an effort to cure Wilson of his mental illness and drug dependency problems, initially supported his treatment by Eugene Landy, a psychologist.

15. In order to "treat" Wilson, Landy claimed he had to exercise extensive medical supervision *over* Wilson's life. However, Wilson became dependent on Landy, a dependence which Landy then took advantage of in many ways, including financially. In breach of professional and ethical obligations, Landy usurped control

over Wilson's life, money, property and even his ability to think, judge and act for himself. Landy's domination of Wilson's life even extended to Wilson's songwriting and his obligations to Brother and The Beach Boys. Landy refused to permit Wilson to participate with The Beach Boys unless Landy co-wrote songs for The Beach Boys or unless he acted as a co-producer of The Beach Boys' records. Landy's interference in the relationship between Wilson and The Beach Boys and Landy's usurpation of Wilson's money and property caused extensive animosity between Landy and The Beach Boys. Two of the surviving members of The Beach Boys are Carl Wilson, Brian's brother, and Mike Love ("Love"), Brian's first cousin, both of whom have been supportive of Wilson for over 30 years. Jardine, the other surviving member of the band, has also been a lifelong friend and supporter of Wilson.

16. Landy's comprehensive mingling of his professional treatment with his control over Wilson's business interests, together with other complaints, caused the California Board of Medical Quality Assurance to take disciplinary action against him. As a result of charges brought by the Board, Landy voluntarily relinquished his license to practice psychology. Yet he continued to retain control over Brian as his "business manager". Brian became Landy's only client. Moreover, Landy's complete control over Wilson, to the extent of cutting off Wilson's relationship with his family as well as The Beach Boys, led Wilson's family to petition the Los Angeles Superior Court to impose a conservatorship for Wilson's benefit. The central focus of the conservatorship proceedings was Landy's domination of Wilson.

17. Landy's domination of Wilson received extensive publicity. Landy sought to counteract the negative publicity which arose as a result of the Board proceedings and the conservatorship proceedings through the purported "autobiography" of Wilson, which Landy used to attack Brother and The Beach Boys. Landy used the Book to claim that The Beach Boys were partially responsible for Wilson's mental illness and that Landy's unorthodox treatment was necessary to save Wilson from The Beach Boys. The Book was part and parcel of Landy's defense to claims of undue influence over Wilson and breach of his professional obligations to Wilson. Through literary agents, Landy contacted defendant HarperCollins to interest them in a book which would be both the telling of Wilson's life and Landy's "miraculous redemption" of Wilson. HarperCollins perceived the purported story of Wilson's life and or Landy's conflicts with The Beach Boys, as told allegedly by Wilson, to be a huge money maker.

18. At all times, HarperCollins knew that Landy was deeply involved in the production of the Book. HarperCollins entered into a partnership with Brains and Genius, which was composed of Landy and Wilson. Landy made all of the business decisions of Brains and Genius. HarperCollins was aware that a professional writer, defendant Todd Gold, had been hired by Landy to write the actual book. Although Gold met with Wilson and interviewed him extensively, Gold reported to Landy and Landy ultimately shaped, revised, and edited the new material that was to appear in the Book, often contradicting statements made by Wilson in taped interviews Wilson had given to Gold.

19. At the time the Book was being prepared for publication, HarperCollins knew or should have known that a conservatorship proceeding was pending which questioned whether Brian Wilson had the capacity to enter into a contract, much less accurately recall the events of his life. Further, at the same time, HarperCollins knew or should have known that Landy had instigated litigation relating to the copyrights of songs Wilson and others had written in an effort by Landy to obtain control over the songs. As part of Landy's plan to control the songs, he directed Wilson in the Book to claim sole authorship of songs which both Landy and Wilson knew were written jointly with other members of The Beach Boys. HarperCollins also knew or should have known that in the copyright litigation, Wilson was claiming that he had been incompetent for virtually the entire period covered by the Book. HarperCollins also knew or should have known of the public claims that Landy had exerted undue influence over Brian Wilson and that Landy was hostile to Brother, to members of Wilson's family and to The Beach Boys. Indeed, a month prior to the publication of the Book on August 8, 1991, the attorney for Carl Wilson informed HarperCollins that he believed the Book to be defamatory, that Landy's participation cast grave doubt on the validity of the contents of the Book, and that Wilson was incompetent. Carl Wilson's lawyer offered to cooperate with HarperCollins to investigate the actual factual matters alleged to be contained in the Book, noting "it is very likely that much of the material in the book is not statements by Brian Wilson but instead defamatory accounts of events by Eugene Landy". In a letter dated August 14, 1991, HarperCollins declined Carl Wilson's

offer, indicating that it believed that no further investigation was necessary. Much of the material in the Book is set forth in quotes purportedly based on the memory of Brian Wilson over a period of 30 years. During most of the 30 years, Wilson was severely mentally ill. Landy was not only Wilson's therapist for such mental illness, but Landy was now using Wilson's mental incapacity as a basis to reclaim the copyrights to The Beach Boys' songs.

20. On or about September 20, 1991, HarperCollins published the Book, copies of which were distributed in all 50 states, including New Hampshire. As part of the publicity for the Book, HarperCollins required Wilson to make a publicity tour. During this tour Wilson conducted interviews with media persons who regularly broadcast their shows into New Hampshire or circulated newspapers or magazines in that state. In these interviews, Wilson restated many of the defamatory allegations asserted below.

21. Since the mid-1960's The Beach Boys have regularly performed in New Hampshire. Since 1962, Beach Boys recordings have been available and have been sold on a continuous basis in New Hampshire. Millions of dollars of Beach Boys records have been sold in New Hampshire throughout the years. The Beach Boys have thousands of fans in New Hampshire and have a valuable reputation to protect within the state.

22. The Book contains numerous false statements of fact of and concerning the plaintiffs which have discredited and lowered the plaintiffs in the esteem of a considerable and respectable class of the community, including but not limited to fans of The Beach Boys,

potential purchasers of their music, and potential attendees of Beach Boys concerts. Some, but not all, of the false and defamatory statements are summarized below:

(a) That the success of The Beach Boys was primarily due to Brian Wilson's efforts: "it wasn't a one man effort, but it was darn close . . . I'd played mother hen to a bunch of guys, multi millionaires now, who would've been pumping gas or selling dental floss without me" Without Wilson, the band suffered from "creative bankruptcy" and was unable to write hit songs. Indeed, the band would have been more appropriately called "Brian Wilson and his Background Singers". That The Beach Boys could not get a record deal "unless I was writing and producing the material."

(b) That The Beach Boys were not musicians but only cold-hearted businessmen interested in money; they masqueraded as rock 'n rollers but they were actually board members of a multi million dollar corporation, where priority was getting radio airplay, not making art; that The Beach Boys were an entertainment corporation only interested in money, but that Landy and Wilson were artists interested in "spiritual" music.

(c) That The Beach Boys intentionally used Wilson to make more money for themselves and that they coerced him into writing songs and producing records even though they knew it would be dangerous to his mental health; that The Beach Boys thought Wilson was "a money machine" or a "song-writing machine"; that The Beach Boys only

wanted Wilson cured from his mental problems so that he could write songs for them again and did not care for his mental well being; that The Beach Boys only paid for Wilson's treatment so they could get a multi million dollar record deal and that once the deal was signed, they were no longer interested in Wilson's mental health; that The Beach Boys made commitments for Wilson regardless of whether he was healthy enough to meet them; and that The Beach Boys knew their commitments would only make Wilson sicker; that the Beach Boys "almost killed" Wilson by requiring him to work on songs and albums when he was not sufficiently healthy.

(d) That The Beach Boys never concerned themselves with "my well being" and that The Beach Boys never gave Wilson any emotional support. So long as Wilson was able to write hit songs and produce records The Beach Boys were "not bothered" that Wilson "hung around with strange people, took drugs, behaved in ways that defied convention and had a marriage that was truly weird;" that The Beach Boys for their own selfish reasons interfered with Wilson's therapy to control his drug and mental problems; that The Beach Boys opposed Wilson's therapy even through [sic] he was improving, because it was interfering with their ability to get him to make records with them; that The Beach Boys were not willing to pay the bills necessary for Wilson's therapy to make him better and that after Wilson ceased therapy with Landy in 1976 The Beach Boys did

nothing when Wilson's condition began to deteriorate again.

(e) That The Beach Boys, without Wilson's consent or approval, created a "Brian is back" publicity campaign in 1976 publicizing Wilson's illness in order to make money for themselves.

(f) That The Beach Boys intentionally spread and fueled false rumors about Landy's fees in 1976 so that Wilson would fire him and The Beach Boys would be able to control Wilson once more.

(g) That The Beach Boys intentionally harassed and intimidated Wilson, knowing that he could not withstand it due to his mental situation. According to Wilson, The Beach Boys would intimidate him in order to get him to vote with them on corporate issues, in order to prevent him from performing with the band when it suited their purposes; that they would throw things at him, even in the middle of performances, when they were angry with him and that they were always "ganging up on me".

(h) That The Beach Boys hired bodyguards that verbally abused and intimidated Wilson, holding him as a virtual prisoner and intimidating him into doing what they wanted.

(i) That The Beach Boys' bodyguards beat up Wilson's brother Dennis Wilson after they discovered that Dennis had supplied cocaine to Wilson.

(j) That The Beach Boys' bodyguards attempted to physically restrain Wilson,

caused him to kick his foot through a plate glass window and ultimately led to an episode in which Wilson was involuntarily hospitalized in a mental institution.

(k) That The Beach Boys only wanted to play and record the same formula of songs; that they were not interested in artistic growth or new sounds in their music; that The Beach Boys were "only concerned about whether it would sell"; that The Beach Boys originally did not like "Good Vibrations," one of the band's biggest hits, thinking it was "bizarre", "avant-garde crap" and "too long"; that changing their music might endanger the sound that made The Beach Boys "wealthy and famous" and that The Beach Boys could not understand music that challenged the conventional approach to pop album making, song structure and sequence; that The Beach Boys stole songs co-written by Eugene Landy and refused to pay royalties for them; that The Beach Boys secretly and covertly taped recording sessions made by Landy and Wilson.

(l) That the surviving members of The Beach Boys had serious drug habits and drinking problems.

(m) That The Beach Boys refused to pay Landy $70,000 for Dennis Wilson to get treatment for his drug problems, and that shortly after The Beach Boys decided it was too expensive to pay for his treatment, Dennis Wilson died in a drug related incident.

(n) That The Beach Boys had "turned against" Wilson and tried to shut him out after Landy's treatment of Wilson made him

more independent; and that Carol [sic] Wilson and other members of the Beach Boys only backed the conservatorship proceedings brought against Wilson because they hated Landy, not because they cared for Wilson.

(o) That The Beach Boys hated Wilson's nurse and companion, Carolyn, not because she gave Wilson drugs (which The Beach Boys allegedly tolerated) but just because she was African-American.

(p) That The Beach Boys participated in "setting up" Carolyn in a drug arrest by having her bags searched when she went through an airport security check.

(q) That The Beach Boys were jealous of Wilson's talent and participated and supported the conservatorship proceedings and other proceedings against Landy because of their petty jealousies.

(r) That Wilson's signature had been forged on documents relating to the copyrights to Beach Boy's songs; and that Wilson was cheated out of the copyrights, when, in fact, Wilson, himself, participated in the transfer of the copyrights to his father and when Wilson knew that his signature had *not* been forged, and that Wilson's own actions caused The Beach Boys to lose the copyrights to their songs.

23. Wilson has acknowledged that many of the allegations about The Beach Boys in the Book are false. He has stated under oath in other proceedings that he did not "bad mouth" any of The Beach Boys, that he would never "bad mouth" The Beach Boys and that he was

"misquoted". Wilson has stated under oath that what Gold has written is "garbage" and "bullshit."

## COUNT I: DEFAMATION

**(By Plaintiff Brother Against All Defendants)**

24. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 23 as though restated herein in full.

25. On or about September 20, 1991 the defendants published the Book. Although the Book only credits Wilson and Gold as co-authors, upon information and belief defendant Landy was actually a co-author. Landy's control over Wilson and his activities caused the writing and publication of the Book. The Book was published by defendant HarperCollins. The defendants and each of them are therefore jointly and severally liable to plaintiff Brother for the defamatory statements published in the Book.

26. The Book has been distributed by the defendants in all 50 states and has sold thousands of copies.

27. Brother has a business reputation or other reputation in its capacity as the corporations through which The Beach Boys do business which has been directly injured by the false and defamatory statements by defendants.

28. As a result of publication of the Book, and the comments Wilson made to media persons in publicizing the Book at the request of HarperCollins, Brother has been defamed in numerous ways, some of which are set

forth above, and its reputation in New Hampshire and across the country has been severely damaged.

29. As a result of the defamatory statements made by the defendants and each of them, Brother has suffered general and special damages in an amount within the jurisdictional limits of this Court. Touring revenues and recording revenues for The Beach Boys were substantially lower in 1991 and 1992 than in prior years and, as a result, Brother has lost income. Such loss of income and other general and special damages to Brother are a direct and proximate result of defendants' wrongful conduct as alleged herein.

30. The aforementioned false, defamatory statements were made by defendants, and each of them, with actual malice and either with knowledge of their falsity or in reckless disregard of the falsity of the statements.

31. Upon information and belief, Brother alleges that defendants' conduct was wanton, malicious or oppressive, and that such conduct was intended to injure plaintiffs and to benefit defendants. Accordingly, the defendants and each of them should pay plaintiff Brother enhanced compensatory damages in an amount to be determined at trial.

## COURT II: DEFAMATION

### (By Plaintiff Brother Against All Defendants But Defendant Wilson)

32. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 23 as though restated herein in full.

33. In the alternative to Plaintiffs First Count for Defamation, Brother alleges that on or about September 20, 1991 the defendants published the Book. Although the Book credits Wilson and Gold as co-authors, upon information and belief defendant Landy was actually a co-author and defendant Wilson was in fact incompetent to act as an author thereof. Rather, Landy, through his control over Wilson and his activities, caused the writing and publication of the Book. Plaintiff is further informed and believes that the Book was published by defendant HarperCollins with knowledge that Wilson did not in fact author the Book and was in fact incompetent to do so. The defendants other than Wilson, and each of them, are therefore jointly and severally liable to plaintiff Brother for the defamatory statements published in the Book.

34. The Book has been distributed by the defendants in all 50 states and has sold thousands of copies.

35. Brother has a business reputation or other reputation in its capacity as the corporations through which The Beach Boys do business which has been directly injured by the false and defamatory statements by defendants.

36. As a result of publication of the Book, and the comments Wilson made to media persons in publicizing the Book, which, on information and belief, were made at the direction and under the control of Landy and at the request of HarperCollins, Brother has been defamed in numerous ways, some of which are set forth above, and its reputation in New Hampshire and across the country has been severely damaged.

37. As a result of the defamatory statements made by the defendants and each of them, Brother has suffered general and special damages in an amount within the jurisdictional limits of this Court. Touring revenues and recording revenues for The Beach Boys were substantially lower in 1991 and 1992 than in prior years and, as a result, Brother has lost income. Such loss of income and other general and special damages to Brother are a direct and proximate result of defendants' wrongful conduct as alleged herein.

38. The aforementioned false, defamatory statements were made by the defendants other than Wilson, and each of them, with actual malice and either with knowledge of their falsity or in reckless disregard of the falsity of the statements.

39. Upon information and belief, Brother alleges that the conduct of defendants other than Wilson was wanton, malicious or oppressive, and that such conduct was intended to injure plaintiffs and to benefit defendants. Accordingly, the defendants other than Wilson, and each of them, should pay Brother enhanced damages in an amount to be determined at trial.

## COUNT III: DEFAMATION

**(By Plaintiff Jardine Against All Defendants)**

40. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 23 as though restated herein in full.

41. On or about September 20, 1991 the defendants published the Book. Although the Book only credits

Wilson and Gold as co-authors, upon information and belief defendant Landy was actually a co-author. Landy's control over Wilson and his activities caused the writing and publication of the Book. The Book was published by defendant HarperCollins. The defendants and each of them are therefore jointly and severally liable to plaintiff Jardine for the defamatory statements published in the Book.

42. The Book has been distributed by the defendants in all 50 states and has sold thousands of copies.

43. Plaintiff Jardine has both a personal and professional reputation which has been directly injured by the aforementioned false and defamatory statements by defendants. Such injury has resulted from false, defamatory statements about both Jardine individually and about The Beach Boys, a small, identifiable group of which Jardine is a member.

44. As a result of publication of the Book, and the comments Wilson made to media persons in publicizing the Book at the request of HarperCollins, plaintiff Jardine has been defamed in numerous ways, some of which are set forth above, and his reputation in New Hampshire and across the country has been severely damaged.

45. As a result of the defamatory statements made by the defendants and each of them, plaintiff Jardine has suffered general and special damages in an amount to be determined at trial, but not less than the jurisdictional minimum of this Court. Touring revenues and recording revenues for The Beach Boys were substantially lower in 1991 and 1992 than in prior years and, as a result, Jardine has lost income. Such loss of income and other general

and special damages to plaintiff Jardine are a direct and proximate result of defendants' wrongful conduct as alleged herein.

46. The aforementioned false, defamatory statements were made by defendants, and each of them, with actual malice and either with knowledge of their falsity or in reckless disregard of the falsity of the statements.

47. Upon information and belief, plaintiff Jardine alleges that defendants' conduct was wanton, malicious or oppressive, and that such conduct was intended to injure plaintiff and to benefit defendants. Accordingly, the defendants and each of them should pay plaintiff Jardine enhanced compensatory or punitive damages in an amount to be determined at trial.

## COUNT IV: DEFAMATION

**(By Plaintiff Jardine Against All Defendants But Wilson)**

48. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 23 as though restated herein in full.

49. In the alternative to Plaintiff Jardine's Third Count for Defamation, Plaintiff Jardine alleges that on or about September 20, 1991 the defendants wrote and or published the Book. Although the Book credits Wilson and Gold as co-authors, upon information and belief defendant Landy was actually a co-author and defendant Wilson was in fact incompetent to act as an author thereof. Rather, Landy, through his control over Wilson and his activities, caused the writing and publication of

the Book. Plaintiff is further informed and believes that the Book was published by defendant HarperCollins with knowledge that Wilson did not in fact author the Book and was in fact incompetent to do so. The defendants other than Wilson, and each of them, are therefore jointly and severally liable to plaintiff Jardine for the defamatory statements published in the Book.

50. The Book has been distributed by the defendants in all 50 states and has sold thousands of copies.

51. Plaintiff Jardine has both a personal and professional reputation which has been directly injured by the aforementioned false and defamatory statements by defendants. Such injury has resulted from false, defamatory statements about both Jardine individually and about The Beach Boys, a small, identifiable group of which Jardine is a member.

52. As a result of publication of the Book, and the comments Wilson made to media persons in publicizing the Book, which, on information and belief, were made at the direction and under the control of Landy and at the request of HarperCollins, plaintiff Jardine has been defamed in numerous ways, some of which are set forth above, and his reputation in New Hampshire and across the country has been severely damaged.

53. As a result of the defamatory statements made by the defendants and each of them, plaintiff Jardine has suffered general and special damages in an amount within the jurisdictional limits of this Court. Touring revenues and recording revenues for The Beach Boys were substantially lower in 1991 and 1992 than in prior years and, as a result, Jardine has lost income. Such loss

of income and other general and special damages to plaintiff Jardine are a direct and proximate result of defendants' wrongful conduct as alleged herein.

54. The aforementioned false, defamatory statements were made by the defendants other than Wilson, and each of them, with actual malice and either with knowledge of their falsity or in reckless disregard of the falsity of the statements.

55. Upon information and belief, plaintiff Jardine alleges that the conduct of the defendants other than Wilson was wanton, malicious or oppressive, and that such conduct was intended to injure plaintiff and to benefit defendants. Accordingly, the defendants other than Wilson, and each of them, should pay plaintiff Jardine enhanced compensatory or punitive damages in an amount to be determined at trial.

## COUNT V: TRADE LIBEL

### (By All Plaintiffs Against All Defendants)

56. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 23, 25 through 31, and 41 through 47 as though restated herein in full.

57. Brother produces, markets, licenses or distributes numerous Beach-Boy products, including, but not limited to Beach Boys' recordings, Beach Boys' t-shirts, Beach Boys' hats and numerous other items which bear the Beach Boys logo. Sales of these items bring the Beach Boys millions of dollars of revenue every year. Brother and The Beach Boys and its members had a reputation for first quality products and entertainment prior to the publication of the Book.

58. By false statements contained in the Book, some (but not all) of which have been summarized above, the defendants have disparaged Beach Boys products, particularly those recordings in which Wilson did not participate. The defendants' intentional, but unfair, disparagements of Beach Boys' products through the false statements made in the Book, and the false statements made by Wilson in the publicity tour which accompanied the publication of the Book, directly resulted in lower sales of Beach Boys products in 1991 and 1992. The false, disparaging statements were published within the state of New Hampshire and throughout the United States.

59. On information and belief, the false, disparaging statements were published maliciously. The defendants either knew that the statements were false and misleading or published the statements in reckless disregard of the falsity of the statements. Each false statement disparaging a Beach Boys' product or Beach Boys service constituted a trade libel.

60. As a direct and proximate result of the trade libel by the defendants and each of them, plaintiffs have suffered general and special damages in an amount within the jurisdictional limits of this Court. The full nature, extent and amount of these damages will be determined through discovery.

61. Upon information and belief, plaintiffs allege that in committing trade libel, the defendants' conduct was wanton, malicious or oppressive, and that such conduct was intended to injure plaintiffs, and to benefit defendants. Accordingly, the defendants and each of

them should pay plaintiffs enhanced compensatory or punitive damages in an amount to be determined at trial.

## COUNT VI: TRADE LIBEL

**(By All Plaintiffs Against All Defendants But Wilson)**

62. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 23, 33 through 39, and 49 through 55 as though restated herein in full.

63. Brother produces, markets, licenses or distributes numerous Beach Boy products, including, but not limited to Beach Boys' recordings, Beach Boys' t-shirts, Beach Boys' hats and numerous other items which bear the Beach Boys logo. Sales of these items bring the Beach Boys millions of dollars of revenue every year. Brother and The Beach Boys and its members had a reputation for first quality products and entertainment prior to the publication of the Book.

64. In the alternative to Plaintiffs' Sixth Count for Trade Libel, Plaintiffs allege that although the Book credits Wilson and Gold as co-authors, upon information and belief defendant Landy was actually a co-author and defendant Wilson was in fact incompetent to act as an author thereof. Rather, Landy, through his control over Wilson and his activities, caused the writing and publication of the Book. Plaintiff is further informed and believes that the Book was published by defendant HarperCollins with knowledge that Wilson did not in fact author the Book and was in fact incompetent to do so. By the false statements contained in the Book, some (but not all) of

which have been summarized above, the defendants other than Wilson have disparaged Beach Boys products, particularly those recordings in which Wilson did not participate. The intentional, but unfair, disparagements of Beach Boys' products by the defendants other than Wilson through the false statements made in the Book, and the false statements made by Wilson in the publicity tour accompanying the publication of the Book, which, on information and belief, were made at the direction and under the control of Landy and at the request of Harper-Collins, directly resulted in lower sales of Beach Boys products in 1991 and 1992. The false, disparaging statements were published within the state of New Hampshire and throughout the United States.

65. On information and belief, the false, disparaging statements were published maliciously. The defendants other than Wilson either knew that the statements were false and misleading or published the statements in reckless disregard of the falsity of the statements. Each false statement disparaging a Beach Boys' product or Beach Boys service constituted a trade libel.

66. As a direct and proximate result of the trade libel by the defendants other than Wilson, and each of them, plaintiffs have suffered general and special damages in an amount within the jurisdictional limits of this Court. The full nature, extent and amount of these damages will be determined through discovery.

67. Upon information and belief, plaintiffs allege that in committing trade libel, the conduct of the defendants other than Wilson was wanton, malicious or oppressive, and that such conduct was intended to injure

plaintiffs, and to benefit defendants. Accordingly, the defendants other than Wilson, and each of them, should pay plaintiffs enhanced compensatory or punitive damages in an amount to be determined at trial.

## COUNT VII: BREACH OF FIDUCIARY DUTY

### (By All Plaintiffs Against Defendant Wilson)

68. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 23, 25 through 31, 41 through 47, and 57 through 61 as though restated herein in full.

69. As a director of Brother, defendant Wilson owed Brother and Jardine a duty of good faith and loyalty. Among Wilson's fiduciary duties was the obligation to take no action which would harm the goodwill of the corporation, the shareholders of the corporation, or the products or services sold by the corporation.

70. By, among other things, defaming The Beach Boys and its members and holding them up the [sic] scorn and ridicule of members of the public who had previously purchased their albums or purchased Beach Boys concert tickets, defendant Wilson breached his fiduciary duties to Brother and to Jardine as a shareholder of Brother.

71. As a direct and proximate result of Wilson's breach of fiduciary duties, Brother and Jardine have suffered general and specific damages in an amount within the jurisdictional limits of this court. The full nature, extent and amount of those damages is currently unknown but, among other things, Wilson's breach of

fiduciary duty has caused significant reductions in touring revenue and recording revenue received by Brother in 1991 and 1992 and in income to Jardine since 1991.

72. Upon information and belief, plaintiffs allege that in breaching his fiduciary duty to Brother and to Jardine, Wilson's conduct was wanton, malicious or oppressive, and that such conduct was intended to injure plaintiffs and benefit defendants. Accordingly, Wilson should pay plaintiffs enhanced compensatory or punitive damages in an amount in accordance with proof at trial.

## COUNT VIII: CONSPIRACY TO BREACH FIDUCIARY DUTY

**(By All Plaintiffs Against All Defendants But Wilson)**

73. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 23, 33 through 39, 49 through 55, 63 through 67, and 69 through 71 as though restated herein in full.

74. Plaintiffs are informed and believed and based thereon allege that at the time the Book was written, through the date of its publication and thereafter, all defendants other than Wilson, and each of them, knowingly and willfully conspired and agreed among themselves to cause defendant Wilson to breach his fiduciary duties to Plaintiffs as alleged hereinabove (the "Defendants' Conspiracy").

75. Plaintiffs are informed and believe and based thereon allege that, pursuant to Defendants' Conspiracy, and in furtherance thereof, Defendants acted as herein alleged, by, among other things, exercising control and

influence over defendant Wilson with knowledge that he was in fact incompetent to so act on his own accord and by causing him to breach his fiduciary duties to Plaintiffs as alleged herein above.

76. As a direct and proximate result of defendants' wrongful acts herein alleged pursuant to Defendants' Conspiracy, Plaintiffs have sustained damages in an amount within the jurisdictional limits of this Court.

77. Upon information and belief, plaintiffs allege that in participating in Defendants' Conspiracy, the conduct of the defendants other than Wilson was wanton, malicious or oppressive, and that such conduct was intended to injure plaintiffs and benefit defendants. Accordingly, the defendants other than Wilson should pay plaintiffs' enhanced compensatory or punitive damages in an amount in accordance with proof at trial.

WHEREFORE, plaintiffs Brother Records, Inc., Brother Tours, Inc. and Alan Jardine pray for the following relief:

1. That after a trial the court will award plaintiffs compensatory damages.

2. That after a trial the court will award plaintiffs enhanced compensatory or punitive damages.

3. That after a trial the court will award plaintiffs their costs and reasonable attorneys' fees.

4. That after a trial the court will award plaintiffs such other relief as this court deems just and appropriate.

Respectfully submitted,
BROTHER RECORDS, INC.,
BROTHER TOURS, INC. and
ALAN JARDINE
By Their Attorneys

By: /s/ Beth George-Kane
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Date: 9/13/94

By: /s/ Michael Tabb
Michael J. Flynn
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Date: 9/13/94

By: /s/ Vincent H. Chieffo
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(310) 556-4660

Date: 9-13-94

VERIFICATION

The facts contained in this Complaint are true to the best of our knowledge and belief.

BROTHER RECORDS, INC.

By /s/ Elliott Lott

STATE OF California
COUNTY OF San Diego

Before me, personnally appeared the above-named Elliott Lott and gave oath that the foregoing statements are true and correct to the best of his/her knowledge and belief.

(seal)
CHERYL L. MARTINI
COMM. #1005597
NOTARY PUBLIC -
CALIFORNIA
SAN DIEGO COUNTY
My Commission Exp.
Sept. 28, 1987

/s/ Cheryl L. Martini
Notary Public/Justice of the Peace

The facts contained in this Complaint are true to the best of our knowledge and belief.

BROTHER TOURS, INC.

By /s/ Elliott Lott

STATE OF California
COUNTY OF San Diego

Before me, personally appeared the above-named Elliott Lott and gave oath that the foregoing statements are true and correct to the best of his/her knowledge and belief.

(seal)
CHERYL L. MARTINI
COMM. #1005597
NOTARY PUBLIC –
CALIFORNIA
SAN DIEGO COUNTY
My Commission Exp.
Sept. 28, 1987

/s/ Cheryl L. Martini
Notary Public/Justice of the Peace

The facts contained in this Complaint are true to the best of my knowledge and belief.

/s/ Alan Jardine
ALAN JARDINE

STATE OF MASSACHUSETTS
COUNTY OF SUFFOCK

Before me, personally appeared the above-named Alan Jardine and gave oath that the foregoing statements are true and correct to the best of his knowledge and belief.

8/23/94
/s/ Judith Lyon Assupanty
Notary Public/Justice of the Peach

MY COMMISSION EXPIRES: 5/31/96

STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY SUPERIOR COURT
SOUTHERN DISTRICT

Brother Records, Inc.,
Brother Tours, Inc. and
Alan Jardine

v.

HarperCollins Publishers, a corporation;
Brian D. Wilson
by and through Jerome S. Billet as Conservator
of the Estate and Person of Brian D. Wilson; Todd Gold;
Eugene Landy; Brains and Genius, a California
partnership of Eugene Landy and Brian D. Wilson;
and Does 1 through 50 inclusive

#94-CV-413

**AFFIDAVIT OF JEROME BILLET IN SUPPORT OF MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

I, Jerome S. Billet, being first duly sworn, depose and say:

1. I reside in Los Angeles, California. I am an attorney licensed to practice law in the State of California, and am currently Of Counsel to the firm of Billet & Kaplan, with offices in Los Angeles, California.

2. On March 9, 1992, I was appointed by the Superior Court of the State of California as Conservator of the Person and the Estate of Brian D. Wilson ("Wilson"). I have served in that capacity without interruption since that time.

3. Since my appointment as Conservator, I have had frequent and regular contact with Wilson. These contacts have included innumerable meetings and telephone conversations. I have also had frequent contact with various members of Wilson's family, as well as other members of the Beach Boys. I have also had substantial contact with many other people who have been part of Wilson's life, including but not limited to physicians and therapists who have treated Wilson.

4. In my role as Conservator, I have learned a great deal about Wilson and his life prior to my appointment. This information has been obtained from the contacts described above, and from a substantial volume of documents which I have had occasion to review. I also gained considerable knowledge in these areas through my review of the court proceedings which led to my appointment as Conservator.

5. Among the information that I have obtained is information to the effect that Wilson has suffered for much of his life, and continues to suffer, from a number of physical and emotional disabilities which interfere with Wilson's ability to concentrate. Based on the reports of physicians and therapists, as well as my own observations of Wilson, I believe that I am in a better position to provide the information upon which this Court could justifiably rely in connection with the Motion to Dismiss.

6. As Conservator of the Person and the Estate of Wilson, I believe that I am competent to testify to the facts set forth in this Affidavit. This testimony is based on information obtained from the sources described above. To the extent possible, I shall identify the sources of

particular statements contained herein, and I shall indicate where I believe doubt exists as to particular statements.

**General Contacts**

7. Wilson currently resides in Los Angeles, California. He was born in California and resided in California from birth. Wilson is a professional musician and was one of the founders of the Beach Boys. He is 52 years old.

8. Wilson has never lived in New Hampshire. According to Wilson, he probably visited New Hampshire during the 1960's in order to perform there as a member of the Beach Boys. I am uncertain as to whether he made more than one trip to New Hampshire for that purpose. Based on my own knowledge of his life and his role as a member of the Beach Boys, it is highly unlikely that Wilson visited New Hampshire for any purpose after approximately 1965. Based on information available to me, he has not been to New Hampshire since my appointment as Conservator.

9. Wilson has no family in New Hampshire, nor has he ever owned real or personal property in New Hampshire. He has never entered into any business transaction with an individual or entity from New Hampshire.

10. Although I am not sure that my own contacts with New Hampshire are relevant to the Court's inquiry, I would add that I have never lived in New Hampshire, and I have never owned property there or transacted business with anyone in New Hampshire. I had occasion to drive through a small portion of New Hampshire

approximately 10 years ago, on my way from Boston to Maine. This was my only contact of any kind with New Hampshire.

**Specific Contacts**

11. The exact status of Brains and Genius, a purported California partnership, is uncertain. I have not located a written partnership agreement for Brains and Genius, nor is the purpose for which the partnership was established clear to me. I believe that Brains and Genius was intended by Eugene Landy ("Landy") to be formed as a partnership comprised of two distinct California corporations, Beach Bum Productions, Inc. and The Beachhead Corporation. I am further informed that Wilson is the sole shareholder and officer of Beach Bum Productions, Inc. and that Landy controlled The Beachhead Corporation. The above information was obtained from a draft partnership agreement. No other documentation has been found to indicate whether the corporate entities or Wilson and Landy were the general partners of Brains and Genius when it contracted with Todd Gold or HarperCollins, as set forth below.

12. On or around October 1, 1989, Brains and Genius entered into an agreement in California with Todd Gold ("Gold"), another defendant in this case. A true copy of this Agreement is annexed hereto as Exhibit A. Gold agreed to assist Brains and Genius in the preparation of an autobiographical book respecting certain events in the life of Wilson. Among other things, Gold agreed to interview Wilson and Landy; to examine data provided by Wilson and Landy; to do independent

research as required by Brains and Genius; to organize this material and prepare outlines; and to prepare manuscripts, revisions and drafts of a book approximately 125,000 words in length.

13. Pursuant to this agreement, Gold conducted interviews with Wilson over the course of thirty to forty hours. All of these interviews were conducted in California.

14. Gold ultimately prepared a manuscript and submitted it to Brains and Genius. From that point forward, the manuscript was edited by Landy and employees of HarperCollins Publishers, which I understand had been procured to publish the book by the William Morris Agency. Wilson has no memory of any further involvement with the book beyond the interview process other than skimming through a final draft of the galleys before its publication.

15. I have reviewed the book, and based thereon and on my knowledge of Wilson's life, it appears that none of the individuals or entities mentioned in the book, including the plaintiffs in this case, resided or were located in New Hampshire and that none of the events or activities described in the book took place in New Hampshire. It also appears that the focal point of such events and activities was California.

16. I understand that Wilson participated, at the request of HarperCollins, in some activities intended to generate sales of the book. To the best of my knowledge, however, none of these activities took place in New Hampshire.

17. Wilson has not, to the best of my knowledge, derived substantial income from the sale of the book. I am not aware that any significant number of copies of the book were sold in New Hampshire, and I believe that Wilson derived no income from sales in New Hampshire.

18. Wilson has not purposefully directed any actions related to the book into New Hampshire, and he had no reason whatsoever to anticipate that the activities described above would subject him to the jurisdiction of the New Hampshire courts.

19. I have read the Memorandum of Law submitted in support of the Motions to Dismiss filed on behalf of Wilson, Gold and the Partnership. The factual statements contained in the Memorandum are true to the best of my knowledge and belief.

/s/ Jerome S. Billet
JEROME S. BILLET

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Personally appeared before me this 28 day of November, 1994 the above-named JEROME S. BILLET and swore that the foregoing statements subscribed by him are true to the best of his knowledge and belief.

(SEAL) OFFICIAL SEAL
Bonnie M. Kerkhoff
Notary Public - California
LOS ANGELES COUNTY
My Comm. Expires
May 15, 1995

/s/ Bonnie M. Kerkhoff
Notary Public

BRAINS AND GENIUS,
A California General Partnership
c/o Mason and Gilbert, L.C.
1299 Ocean Avenue, Penthouse
Santa Monica, California 90401

Mr. Todd Gold
13916 Runnymede
Van Nuys, CA 91405

Dated as of October 1, 1989

Re: Brian Wilson Autobiography/Collaboration Agreement

Dear Todd:

The following is our understanding with respect to the services which you are to render to us in connection with the preparation of the proposed autobiographical book respecting certain events in the life story of Brian Wilson ("Wilson") (said book the "Autobiography").

1. We hereby engage you to assist us in the preparation of the Autobiography and you hereby accept such employment. Among your services hereunder will be, without limitation, to interview Wilson and others, including Dr. Eugene Landy ("Landy"), at mutually convenient times, to examine data which we, Wilson and/or Landy will make available to you, to do independent research wherever required by us, to organize the material, draw outlines, and to prepare manuscripts, revisions and drafts, including, without limitation, in connection with the hardback and paperback versions, for our, Wilson's and Landy's review and for submission to the publisher of the Autobiography (the "Publisher").

2. The term of your services hereunder (the "Term") shall commence as of the date hereof and shall continue

until the general release of the Autobiography through normal retail channels in the United States. It is the intention of the parties that the Autobiography will be approximately one hundred twenty-five thousand (125,000) words in length and that it will be completed on or before October 1, 1990, unless otherwise required by the terms and conditions contained in our agreement with the Publisher. You shall deliver all manuscripts, in completed and corrected form hereunder and galleys thereof to us and/or, at our direction, to the Publisher in sufficient time for us to meet our time schedules and designated deadlines.

3. All services to be rendered by you hereunder shall be done under our or our designee's direction and supervision. Drafts of successive portions of the Autobiography will be submitted to us for our consideration and shall be subject to our approval. We shall furnish the non-exclusive services of Wilson and/or Landy to make such writing and editorial contributions to the Autobiography and any manuscripts thereof as we may, in our sole discretion require. Without limiting the generality of the foregoing, we, Wilson and/or Landy shall be entitled to make and/or to or request that you make such changes, additions, and eliminations as we may desire or deem necessary, and you will promptly incorporate any such changes, additions and deletions and otherwise comply with such requests. It is our intention that all matters relating to the content and the preparation of the manuscripts for the Autobiography, including, without limitation, the content, final choice of title, illustrations and the like, as well as the manner of and timing of

publication of the Autobiography, and the choice of Publisher(s), shall be, as between you and us, within our exclusive control and discretion.

4. Wilson shall appear as the author of the Autobiography. Provided you are the sole collaborator on the Autobiography and are not in default hereof, we shall instruct the Publisher to accord you credit for your assistance in connection with the Autobiography as follows: "By Brian Wilson with Todd Gold". The format of the credit, the size, placement and all other matters with respect to your credit shall be left to our and/or the Publisher's discretion.

5. (a) You acknowledge and agree (as among you, Wilson and us) that: all of the results and proceeds of your services hereunder, shall, from the inception of its creation, be considered a "word made for hire" for us within the meaning of the U.S. Copyright Law. If it is determined that such results and proceeds do not so qualify, then such results and proceeds, together with all rights in it, shall be deemed irrevocably transferred to us or, at our election, to our designee(s) by this Agreement.

(b) In addition, for good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, we are the exclusive owner of all rights of whatever nature in and to the worldwide copyrights, (including all renewals and extensions thereof) in and to your life story insofar as it relates to Wilson, from the inception of your interaction and/or relationship and/or communications with us and/or Wilson and continuing in perpetuity (such life story rights and rights in and to

the results and proceeds of your services hereunder being hereinafter referred to as the "Property").

(c) The Property shall in all respects and from inception remain our sole and exclusive property in perpetuity, throughout the universe, free of any claim whatsoever by you or by any person deriving any rights or interest from you, your heirs, successors and assigns; and we shall have the right to secure the copyright in and to any or all of the Property in our or Wilson's name as the owner and author thereof and to secure any and all renewals of such copyright to the extent permitted by law.

(d) You shall execute and deliver to us or our designee such instruments of transfer and other documents regarding our rights in connection with your services hereunder, including, without limitation with respect to the Property) as we may request to carry out the purposes of this paragraph, including, without limitation, the Declaration of Collective Work and Power of Attorney which is attached hereto as Exhibit "A" and incorporated herein by this reference, and the Employment Eligibility Verification Form (Form I-9) attached hereto as Exhibit "B" and incorporated herein by this reference. You hereby irrevocably appoint us as your lawful attorney-in-fact to sign such documents in your name and to make appropriate disposition of them as we shall in our sole discretion deem necessary if and when you fail to so sign such documents within ten (10) business days after our request therefor. As between you and us, we shall have the sole and exclusive right to use and disseminate and to authorize the use and dissemination

of the Property or any part thereof throughout the universe in perpetuity, in any manner and by any means, whether now or hereafter known, devised or developed.

6. Provided that you have rendered all of the services required of you hereunder and are not in default hereof, you shall be entitled to receive, as full and complete consideration for all of your services rendered and obligations hereunder and all rights granted by you hereunder, a sum equal to one-third (1/3) of all "Net Income" (as hereinafter defined) actually earned and received by us (including, but not limited to, advances against and in reduction of royalties) derived solely and directly from "Book Activities (as hereinafter defined). The term "Net Income", as used herein, shall mean all gross compensation derived from the exploitation hereunder of Book Activities, less any and all direct costs and expenses incurred by us in connection with the preparation of the Autobiography including, without limitation, the agency commission payable to the William Morris Agency in paragraph 9 hereinbelow, and any attorney's fees and costs whether or not in connection with litigation (expressly excluding any such costs incurred by us in the negotiation of this agreement, Exhibit "C" and our agreement with Publisher). The term "Book Activities", as used herein, shall mean the sale, lease, license or other disposition of any and all (i) print publication rights in the Autobiography of whatever kind or nature, including hard cover and paperback rights, book club, translation, serialization, books on tape, and foreign publication and foreign language publications, of the Autobiography; and/or (ii) rights for theatrical motion pictures and television "movies of the week" (including videocassette

rights) which are specifically based on the Autobiography and which are produced pursuant to an option or purchase agreement(s) granting motion picture/television rights derived from the Autobiography ("Optioned Movies"), but specifically excluding rights in, to and with respect to that certain autobiographical motion picture project presently at Paramount Pictures Corporation. It is expressly understood and agreed that the term "Book Activities", as used herein, shall expressly exclude, without limitation: the sale, lease, license or other disposition of any and all non-print publication rights in the Autobiography (other than specifically provided above) of whatever kind or nature such as, by way of example only and without limitation, dramatic rights, allied motion picture rights, educational picture rights, soundtrack rights, radio rights, live television, stage, merchandising, and commercial tie-up rights, now or hereafter known, whether or not rights based on or incorporating, in whole or in part, Wilson's life story or any part thereof, and any other disposition of rights in the Autobiography, and any and all compact disc and other digital recording rights, whether such technology is now or hereafter invented, if music, still pictures, moving pictures, videos or any other audio or pictorial representations are included in the compact disc/digital configuration (i.e., compact discs/digital configurations embodying only the retrieval of the print publications are not excluded from Book Activities). Payment to you of monies due to you hereunder shall be made within thirty (30) days after our receipt thereof from the applicable payer. Notwithstanding the provisions of this paragraph, and without limitation of our, Wilson's and Landy's rights hereunder, you shall have no

voice in any arrangements for the publication of the Autobiography or the sale or other disposition of any rights therein.

7. If you die or become incapacitated before the completion of the galley for the Autobiography, all material pertaining thereto in your possession shall be turned over to us forthwith; and, provided you are not in default hereof, we agree to pay you or to your estate, in lieu of the compensation set forth in paragraph 6 above, an amount to be determined between us and your estate in the manner described in subparagraph 8(b) hereinbelow.

8. (a) We shall have the right, for any reason whatsoever in our sole judgment and discretion, to terminate our obligations hereunder and to make such dispositions and decisions regarding the disposition of the Autobiography including, without limitation: (i) to make other arrangements for literary assistance at any time if we are not satisfied with the way the Autobiography is progressing; and/or (ii) not to publish the Autobiography.

(b) If such termination is for other than default and the Autobiography is thereafter published, the amount of compensation, if any, payable to you (or to be retained by you from monies already received) shall be determined by mutual agreement between you and us to be such percentage of the amount otherwise payable to you pursuant to paragraph 6 hereinabove as may be fair and reasonable under the circumstances taking into consideration the amount and character of work actually performed by you hereunder, and the amount of your material that appears in the published version of the Autobiography, with the understanding, however, that in

the event you and we are unable to agree with respect to such percentage despite good faith negotiations, then said matters shall be submitted to and determined by arbitration by a mutually agreeable arbitrator in Los Angeles, pursuant to the rules of the Los Angeles American Arbitration Association.

(c) Provided you are not in default hereof the amounts, theretofore received by you shall be an advance against any other amounts determined to be due to you pursuant to subparagraph 8(b) above and you shall immediately remit any excess amounts over the amount so determined. The amount determined to be due to you pursuant to subparagraph 8(b) above shall constitute full and complete consideration for your services rendered hereunder, and neither you nor anyone claiming through or deriving rights from you shall have any other claim of any kind or nature or any other interest in the Autobiography or the concept therefor or in any materials you have prepared hereunder. If we decide to make other arrangements for literary assistance, we shall give you at least two (2) weeks' notice thereof in writing.

9. You and we hereby agree that the William Morris Agency is being engaged as the exclusive agent for the procurement of a Publisher and publishing agreement for the Autobiography and that the William Morris Agency shall be entitled to receive commissions in connection therewith upon the terms and conditions set forth in Exhibit "C" attached hereto and incorporated herein by this reference.

10. We may terminate your services at any time upon written notice to you, upon default of your obligations under this agreement. In the event of such termination "for cause," then, without limiting our other rights and remedies, we shall have no further obligation to pay you any compensation hereunder. As used herein, the term "for cause" shall include, without limitation, the following: (i) your conviction of a misdemeanor involving moral turpitude or any felony; (ii) your engaging in a prohibited conflict of interest hereunder, or publicly disclosing confidential information in violation of this agreement or publicly rebuking, maligning or defaming us, Wilson, Landy or any of our affiliated entities; (iii) your undertaking of employment for a third party during the Term without our prior written approval; (iv) your failure or refusal without our consent for any reason other than sickness or disability to render services hereunder for a period in excess of ten (10) consecutive days, or by reason of sickness or disability for a period in excess of thirty (30) days in the aggregate; or (v) any material breach of any of your material obligations under this agreement; provided, however, that we shall not have the right to terminate you by reason of such material breach unless you fail to cure same within seven (7) days after your receipt of our written notice thereof.

11. (a) It is agreed that your services hereunder are on a non-exclusive, but first priority basis until such time as the Autobiography is first generally released throughout the United States through normal retail channels. You further agree that you shall not have the right to engage in any other business or to enter into any agreements pursuant to which you shall obtain any benefit

directly or indirectly, arising from or in connection with your services hereunder, other than as approved in writing by us.

(b) It is understood and agreed that in entering into this Agreement and providing your services hereunder, you have, and shall have, the status of an independent contractor. Nothing herein contained shall contemplate or constitute you our partner, joint venturer or agent. You acknowledge that your services hereunder are of a special, unique, extraordinary and intellectual character, the loss of which shall be irreparable and not reasonably compensated by damages in an action at law, and that we shall be entitled to injunctive and other equitable relief to enforce the provisions of this Agreement or to curtail any breach of this agreement by you, in addition to any other rights or remedies to which we may be entitled in such event.

(c) If you shall fail, refuse or neglect to perform any obligations hereunder whatsoever ("Event of Default"), we shall, in addition to our other rights and remedies, have the right to suspend our obligations hereunder for the duration of such Event of Default and/or to terminate this Agreement, and, in the event of such termination, be relieved of any executory obligations to you hereunder.

12. You hereby grant to us and our respective designees (including, but not limited to, Publisher) the right to use and to allow others to use and publish your name, biographical material and likenesses for purposes

of advertising and trade in connection with the Autobiography and/or the results and proceeds or your services pursuant to this agreement.

13. (a) You hereby acknowledge, stipulate and agree that any and all information obtained, learned or generated by you during the course of your employment hereunder (or prior hereto to the extent you obtained, learned or generated any information as a result of any contact or communication you had with or respecting us, Wilson or Landy prior to the date of this agreement) is strictly confidential ("Confidential Information") and is not to be disclosed by you directly or indirectly to any person or entity for any purpose, except in the ordinary course of business to our or Wilson's designated representatives who have been previously identified to you.

(b) You hereby acknowledge, stipulate and agree that the Confidential Information defined above is comprised of private facts; that unauthorized public disclosure of the Confidential Information would be offensive and objectionable to the reasonable person; and that the Confidential Information is not of legitimate public concern or newsworthy. You further acknowledge, stipulate and agree that any disclosure by or on behalf of you of any Confidential Information without our specific and express authorization in each instance in writing shall be included as an unauthorized public disclosure of the Confidential Information by you; that any unauthorized disclosure by you would be embarrassing, detrimental, humiliating and harmful to our and/or Wilson's and/or Landy's career and personal and professional image; that the harm to us, Landy and/or to Wilson could not be reasonably or adequately compensated by damages in an

action at law; and that we, Landy and Wilson would suffer irreparable injury. Accordingly, you hereby acknowledge, stipulate and agree as follows:

(i) We, Landy and Wilson shall be entitled to injunctive or other equitable relief to prevent any unauthorized disclosure of Confidential Information by you, to preserve the relationship created herein and to mandate compliance with the terms of this agreement;

(ii) If you indicate at any time that you do not intend to honor your obligation not to disclose the Confidential Information, such indication shall constitute a breach of your confidentiality agreement entitling us, Wilson and Landy to injunctive and other equitable relief; and

(c) Resort to injunctive or other equitable relief to prevent an unauthorized or threatened disclosure of Confidential Information by you shall not constitute a waiver of any other rights which we or Wilson may have for damages.

14. You hereby represent, warrant and agree, for the benefit of us, Wilson and Landy, that:

(a) you have a bona fide intention to write and cooperate with us, Wilson and Landy in the preparation of all manuscripts required by us for delivery to this Publisher.

(b) you have no other contractual commitments of any kinds which will or might conflict or interfere with the performance of your obligations hereunder.

(c) all material, written or furnished by you shall be your own research accurately based on

information properly obtained during the course of your employment hereunder or shall be based on information supplied by us or at our specific direction for publication in Autobiography, and shall not infringe upon or violate any copyright, proprietary right or the right of privacy or constitute a libel, slander against or violate any common law rights or other rights of any person, firm or entity.

(d) you will indemnify and hold us, Wilson, Landy and our respective successors, executors, administrators and assigns harmless from any and all claims, demands, suits, losses, costs, expenses (including reasonable attorneys' fees and costs) by reason of any breach or claim of breach of this or any other agreement, this representations, warranties or covenants therein contained. You shall promptly notify us of any such claim, action or proceeding of which you become aware.

All warranties and representations hereunder shall survive the termination of this agreement.

15. We will indemnify you and hold you harmless from any and all claims, demands, suits, losses, costs, expenses incurred by you by reason of any claims directly arising from any material furnished by us, Wilson or Landy to you in the preparation of the Autobiography, which material has been specifically and expressly authorized by us for publication in the Autobiography.

16. Each party hereto stipulates that it has been represented by and has relied upon counsel of its own choosing in the negotiations for the preparation of this agreement, and that it has read this agreement, has had its contents fully explained to it by such counsel, and is

fully aware of and understands all of its terms and the legal consequences thereof.

17. This agreement shall inure to the benefit of and be binding upon us and our successors, licensees and assigns. Neither this agreement, nor any of your duties hereunder shall not be assigned or delegated, in whole or in part.

18. All notices and other communications hereunder shall be in writing and shall be given by hand delivery to the other party or by registered or certified mail, return receipt requested, postage prepaid, at the respective address indicated on the first page hereof or to such other address as either party shall give notice to the other in writing. Notices shall be deemed given when deposited in the mails. A courtesy copy of all notices to you shall be sent to: Dan Strone, Esq., William Morris Agency, 151 El Camino, Beverly Hills 90212. A courtesy copy of all notices to us shall be sent to Mason and Gilbert, 1299 Ocean Avenue, Penthouse, Santa Monica, California 90401; Attention: John Mason, Esq.

19. (a) All prior understandings, agreements and arrangements (whether written, oral or implied) between you and us, Wilson and/or Landy, if any, are terminated as of the date of this agreement and are hereby merged herein.

(b) This agreement sets forth the entire understanding between us; there are no terms conditions representations warranties or covenants other than those set forth herein. No term or provision of this agreement may be amended, waived released, discharged or modified in any respect except in writing, signed by the party to be

charged. No waiver or any breach or default shall constitute a waiver of any other breach or default, whether or not similar. A delay or failure to assert rights or a breach of this agreement shall not be deemed to be a waiver of such rights either with respect to that breach or any subsequent breach.

(c) The invalidity or unenforceability of any provision of this agreement shall not affect the validity or enforceability of any other provision of this agreement.

(d) Neither party hereto shall hold itself out contrary to the terms of this agreement, and neither you nor we shall become liable for any representation, act or omission of the other contrary to the provisions hereof. This agreement shall not be deemed to give any right or remedy to any third party whatsoever unless said right or remedy is specifically granted hereunder.

(e) This agreement shall be governed by and construed in accordance with the laws of the State of California applicable to agreements made and to be wholly performed therein.

(f) You hereby agree to execute any further documents and do any and all acts necessary or appropriate to fully effectuate the terms and provisions of this agreement and to permit us to comply with the terms and conditions of our agreements with third parties.

(g) No breach or alleged breach by us, Landy and/or Wilson of any of our obligations hereunder shall entitle you to recover damages, or affect any of your obligations hereunder, unless we shall have failed to remedy such breach or alleged breach within thirty (30) days

following receipt of your written notice specifying such breach or alleged breach, and no alleged breach shall be deemed incurable. In no event whatsoever shall you have any right to seek or obtain injunctive or equitable relief against us, Wilson, Landy, the Publisher or any of the respective officers, directors, licensees, successors and assigns of any of the foregoing. We hereby acknowledge that you wrote certain unpublished notes for then potential article for *PEOPLE* magazine, pursuant to the terms of your employment and that *PEOPLE* magazine owns said notes as your employer.

If the foregoing correctly reflects the understanding and agreement between us with respect to the subject matter hereof, please so indicate by signing your name in the space provided below.

Sincerely,

BRAINS AND GENIUS,
a California General
Partnership

By: /s/ Brian Wilson
Its General
Partner

AGREED TO
AND ACCEPTED:

/s/ Todd Gold
Todd Gold
d:\wilson\toddk

SSAN: 314-50-8590

CERTIFICATE OF SERVICE

I hereby certify that on this first day of December, 1994, I served the within Affidavit of Jerome Billet in Support of Motions to Dismiss on the plaintiffs and on the remaining defendants by sending copies thereof, by

first-class mail, to Attorneys Beth George-Kane, Michael J. Flynn, Michael Tabb and Vincent H. Chieffo, all counsel to the plaintiffs, and to Attorneys William L. Chapman, Bruce Rich and Katherine J. Daniels, counsel to defendant HarperCollins Publishers.

/s/ Richard C. Gagliuso
Richard C. Gagliuso

cert.billet

STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY SUPERIOR COURT
SOUTHERN DISTRICT

Brother Records, Inc.
Brother Tours, Inc. and
Alan Jardine

v.

HarperCollins Publishers, a corporation;
Brian D. Wilson
by and through Jerome S. Billet as Conservator
of the Estate and Person of Brian D. Wilson; Todd Gold;
Eugene Landy; Brains and Genius, a California
partnership of Eugene Landy and Brian D. Wilson;
and Does 1 through 50 inclusive

#94-CV-413

**AFFIDAVIT OF DEFENDANT TODD GOLD IN SUPPORT OF MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

I, Todd Gold, being first duly sworn, depose and say:

**General Contacts**

1. I reside at 4448 Ethel Avenue, Studio City, California. I have resided continuously in California since 1976. I am a professional writer, and I am 36 years old.

2. I have never lived in the State of New Hampshire, nor have I ever been to New Hampshire for any purpose.

3. I have no family in New Hampshire, and I have never owned real or personal property in New Hampshire.

4. I have never entered into any business transaction with an individual or entity from New Hampshire.

**Specific Contacts**

5. In or about October 1989, I entered into an agreement in California with Brains and Genius, a California partnership which is named as a defendant in this case. I agreed to research and write a manuscript for a book which was to be an autobiography of Brian D. Wilson, a member of the Beach Boys. Under the terms of the agreement, I was to be paid by Brains and Genius for my work, and turn the completed manuscript over to Brains and Genius, retaining no rights to the research materials or the manuscript or to determine the manner by which it would be published.

6. To the best of my knowledge then and now, Brains and Genius was a partnership comprised of Brian Wilson and Eugene Landy, both California residents, which did not do business in the State of New Hampshire.

7. Pursuant to this agreement with Brains and Genius, I conducted extensive research for the book, including several interviews with Brian D. Wilson. All of this research, including the interviews, was conducted in California except for one week in which I toured with the Beach Boys. This research and the trip did not bring me into or in contact with anyone in New Hampshire.

8. I wrote the manuscript for the book in California. No portion of this work was done in New Hampshire.

9. I was paid for the manuscript by Brains and Genius in California, by check drawn on a California bank.

10. I had no editorial control over the book, my involvement with its editing or publication after I submitted the manuscript to Eugene Landy was merely to incorporate changes and comments made by Landy or Brian Wilson.

11. At no time did I have any contractual or other relationship with defendant HarperCollins Publishers, which I understand ultimately published the book. I had no rights to the manuscript, and no right to designate who would publish it.

12. None of the individuals or entities mentioned in the manuscript I wrote, including but not limited to the plaintiffs in this case, resided or were located in New Hampshire. None of the events or activities described in the manuscript took place in New Hampshire.

13. My involvement with the publication of the book by HarperCollins Publishers was limited to receiving inquiries from HarperCollins' editor and on occasion, its attorney, and taking the questions to Landy or Brian Wilson for their respective responses, which I would then convey to HarperCollins. I had no involvement with the distribution of the book or the advertising of the book for sale, nor did I have any knowledge or understanding as to if, when or where the book would be distributed.

14. I have not purposefully directed any actions related to the book into New Hampshire, and I had no

reason whatsoever to anticipate, and in fact did not anticipate, that the activities described above would subject me to the jurisdiction of the New Hampshire courts.

/s/ Todd Gold
TODD GOLD

STATE OF CALIFORNIA
COUNTY OF Los Angeles

Personally appeared before me this 18th day of November, 1994 the above-named Todd Gold and swore that the foregoing statements subscribed by him are true to the best of his knowledge and belief.

/s/ Emily Cole
Notary Public

[SEAL]

CERTIFICATE OF SERVICE

I hereby certify that on this first day of December, 1994, I served the within Affidavit of Todd Gold in Support of Motions to Dismiss on the plaintiffs and on the remaining defendants by sending copies thereof, by first-class mail, to Attorneys Beth George-Kane, Michael J. Flynn, Michael Tabb and Vincent H. Chieffo, all counsel to the plaintiffs, and to Attorneys William L. Chapman, Bruce Rich and Katherine J. Daniels, counsel to defendant HarperCollins Publishers.

/s/ Richard C. Gagliuso
Richard C. Gagliuso

cert.gold

STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY SUPERIOR COURT
SOUTHERN DISTRICT

Brother Records, Inc.,
Brother Tours, Inc. and
Alan Jardine

v.

HarperCollins Publishers, a corporation;
Brian D. Wilson
by and through Jerome S. Billet as Conservator
of the Estate and Person of Brian D. Wilson;
Todd Gold; Eugene Landy; Brains and Genius,
a California partnership of Eugene Landy and
Brian D. Wilson; and Does 1 through 50 inclusive

#94-CV-413

**AFFIDAVIT OF RONALD E. GUTTMAN IN SUPPORT OF MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

I, Ronald E. Guttman, being first duly sworn, depose and say:

1. I reside in Los Angeles, California. I am an attorney licensed to practice law in the State of California, and I am Of Counsel to the firm of Christensen, White, Miller, Fink & Jacobs, with offices at 2121 Avenue of the Stars, Los Angeles, California.

2. I submit this affidavit in support of the Motions to Dismiss the above action for the purpose of respectfully advising the Court of the California Statute of Limitations on libel actions and the relevant Probate Code provisions relating to the appointment of a Conservator.

This affidavit is also for the purpose of authenticating the attached copies of the California Code of Civil Procedure, Sections 335, 340, 372 and 416.70 and the California Probate Code, Sections 1800, 1800.3, 1801, 1820, 1821 and 1872 relating thereto.

3. California has enacted a one-year Statute of Limitations governing defamation actions, which is set forth in California Code of Civil Procedure §§335, 340, copies of which are annexed hereto as Exhibit 1.

4. Conservatorship proceedings in California are governed by provisions of the Probate Code, Sections 1800 *et seq.* Copies of the relevant Sections 1800, 1800.3, 1801, 1820, 1821 and 1872 are annexed hereto as Exhibit 2.

5. Statutory provisions relating to the commencement of an action or service of process upon a person for whom a Conservator has been appointed are contained in the Code of Civil Procedure at Sections 372 and 416.70; copies of which are annexed hereto as Exhibit 3.

/s/ Ronald E. Guttman
RONALD E. GUTTMAN

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Personally appeared before me this 23rd day of November, 1994 the above-named Ronald E. Guttman and swore that the foregoing statements subscribed by him are true to the best of his knowledge and belief.

/s/ Emily Cole
Notary Public

(Seal) OFFICIAL SEAL
EMILY COLE
Notary Public-California
LOS ANGELES COUNTY
My Commission Expires
November 1, 1995

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**EXHIBIT 1**

**§ 335. Periods of limitation**

*Periods of limitation prescribed.* The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows: *(Enacted 1872.)*

**§ 340. One year**

Within one year:

**(1) Statutory penalty or forfeiture to individual and state.** An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation.

**(2) Statutory forfeiture or penalty to state.** An action upon a statute for a forfeiture or penalty to the people of this state.

**(3) Libel, slander, assault, battery, false imprisonment, seduction, injury or death from wrongful act or neglect, forged or raised checks, injury to animals by feeder or veterinarian.** An action for libel, slander,

assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Section 4826 of the Business and Professions Code, for such person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding such animal or fowl or in the course of the practice of veterinary medicine on such animal or fowl.

**(4) Damages for seizure.** An action against an officer to recover damages for the seizure of any property for a statutory forfeiture to the state, or for the detention of, or injury to property so seized, or for damages done to any person in making any such seizure.

**(5) Action by good faith improver.** An action by a good faith improver for relief under Chapter 10 (commencing with Section 871.1) of Title 10 of Part 2 of the Code of Civil Procedure. The time begins to run from the date upon which the good faith improver discovers that the good faith improver is not the owner of the land upon which the improvements have been made. *(Enacted 1872. Amended by Code Am. 1873-74, c. 383, § 34; Code Am. 1875-76, c. 29, § 1; Stats. 1905, c. 258, § 2; Stats. 1929, c. 518, § 1; Stats. 1939, c. 1103, § 1; Stats. 1949, c. 863, § 1; Stats. 1953, c. 1382, § 1; Stats. 1963, c*

## EXHIBIT 2

**§ 1800. Legislative intent**

It is the intent of the Legislature in enacting this chapter to do the following:

(a) Protect the rights of persons who are placed under conservatorship.

(b) Provide that an assessment of the needs of the person is performed in order to determine the appropriateness and extent of a conservatorship and to set goals for increasing the conservatee's functional abilities to whatever extent possible.

(c) Provide that the health and psychosocial needs of the proposed conservatee are met.

(d) Provide that community-based services are used to the greatest extent in order to allow the conservatee to remain as independent and in the least restrictive setting as possible.

(e) Provide that the periodic review of the conservatorship by the court investigator shall consider the best interests of the conservatee.

(f) Ensure that the conservatee's basic needs for physical health, food, clothing, and shelter are met.

(g) Provide for the proper management and protection of the conservatee's real and personal property.

Enacted Stats 1990 ch 79 § 14 (AB 759), operative July 1, 1991.

**§§ 1800.1, 1800.2.** [No Sections of these numbers]

**§ 1800.3. Conservatorships for adults or married minors**

If the need therefore is established to the satisfaction of the court and the other requirements of this chapter are satisfied, the court may appoint:

(a) A conservator of the person or estate of an adult, or both.

(b) A conservator of the person of a minor who is married or whose marriage has been dissolved.

Enacted Stats 1990 ch 79 § 14 (AB 759), operative July 1, 1991.

**§ 1801. Showing required for appointment generally**

Subject to Section 1800.3:

(a) A conservator of the person may be appointed for a person who is unable properly to provide for his or her personal needs for physical health, food, clothing, or shelter, except as provided for such person as described in subdivision (b) or (c) of Section 1828.5.

(b) A conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence, except as provided for such person as described in subdivision (b) or (c) of Section 1828.5. Substantial inability may not be proved solely by isolated incidents of negligence or improvidence.

(c) A conservator of the person and estate may be appointed for a person described in subdivisions (a) and (b).

(d) A limited conservator of the person or of the estate, or both, may be appointed for a developmentally disabled adult. A limited conservatorship may be utilized only as necessary to promote and protect the well-being of the individual, shall be designed to encourage the development of maximum self-reliance and independence of the individual, and shall be ordered only to the extent necessitated by the individual's proven mental and adaptive limitations. The conservatee of the limited conservator shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator. The intent of the Legislature, as expressed in Section 4501 of the Welfare and Institutions Code, that developmentally disabled citizens of this state receive services resulting in more independent, productive, and normal lives is the underlying mandate of this division in its application to adults alleged to be developmentally disabled.

Enacted Stats 1990 ch 79 § 14 (AB 759), operative July 1, 1991.

**§ 1820. Filing of petition**

(a) A petition for the appointment of a conservator may be filed by any of the following:

(1) The proposed conservatee.

(2) The spouse of the proposed conservatee.

(3) A relative of the proposed conservatee.

(4) Any interested state or local entity or agency of this state or any interested public officer or employee of this state or of a local public entity of this state.

(5) Any other interested person or friend of the proposed conservatee.

(b) If the proposed conservatee is a minor, the petition may be filed during his or her minority so that the appointment of a conservator may be made effective immediately upon the minor's attaining the age of majority. An existing guardian of the minor may be appointed as conservator under this part upon the minor's attaining the age of majority, whether or not the guardian's accounts have been settled.

(c) A creditor of the proposed conservatee may not file a petition for appointment of a conservator unless the creditor is a person described in paragraph (2), (3), or (4) of subdivision (a).

Enacted Stats 1990 ch 79 § 14 (AB 759), operative July 1, 1991.

**§ 1821. Contents of petition**

(a) The petition shall request that a conservator be appointed for the person or estate, or both, shall specify the name, address, and telephone number of the proposed conservator and the name, address, and telephone number of the proposed conservatee, and state the reasons why a conservatorship is necessary. Unless the petitioner is a bank or other entity authorized to conduct the business of a trust company, the petitioner shall also file supplemental information as to why the appointment of a conservator is required. The supplemental information to

be submitted shall include a brief statement of facts addressed to each of the following categories:

(1) The inability of the proposed conservatee to properly provide for his or her needs for physical health, food, clothing, and shelter.

(2) The location of the proposed conservatee's residence and the ability of the proposed conservatee to live in the residence while under conservatorship.

(3) Alternatives to conservatorship considered by the petitioner and reasons why those alternatives are not available.

(4) Health or social services provided to the proposed conservatee during the year preceding the filing of the petition, when the petitioner has information as to those services.

(5) The inability of the proposed conservatee to substantially manage his or her own financial resources, or to resist fraud or undue influence.

The facts required to address the categories set forth in paragraphs (1) to (5), inclusive, shall be set forth by the petitioner when he or she has knowledge of the facts or by the declarations or affidavits of other persons having knowledge of those facts.

Where any of the categories set forth in paragraphs (1) to (5), inclusive, are not applicable to the proposed conservatorship, the petitioner shall so indicate and state on the supplemental information form the reasons therefor.

The Judicial Council shall develop a supplemental information form for the information required pursuant to

paragraphs (1) to (5), inclusive, after consultation with individuals or organizations approved by the Judicial Council, who represent public conservators, court investigators, the State Bar, specialists with experience in performing assessments and coordinating community-based services, and legal services for the elderly and disabled.

The supplemental information form shall be separate and distinct from the form for the petition. The supplemental information shall be confidential and shall be made available only to parties, persons given notice of the petition who have requested this supplemental information or who have appeared in the proceedings, their attorneys, and the court. The court shall have discretion at any other time to release the supplemental information to other persons if it would serve the interests of the conservatee. The county clerk shall make provision for limiting disclosure of the supplemental information exclusively to persons entitled thereto under this section.

(b) The petition shall set forth, so far as they are known to the petitioner, the names and addresses of the spouse and of the relatives of the proposed conservatee within the second degree. If no spouse of the proposed conservatee, or relatives of the proposed conservatee within the second degree are known to the petitioner, the petition shall set forth, so far as they are known to the petitioner, the names and addresses of the following persons who, for the purposes of Section 1822, shall all be deemed to be relatives:

(1) A spouse of a predeceased parent of a proposed conservatee.

(2) The children of a predeceased spouse of a proposed conservatee.

(3) The siblings of the proposed conservatee's parents, if any, but if none, then the natural and adoptive children of the proposed conservatee's parents' siblings.

(4) The natural and adoptive children of the proposed conservatee's siblings.

(c) If the petition is filed by a person other than the proposed conservatee, the petition shall state whether or not the petitioner is a creditor or debtor, or the agent of a creditor or debtor, of the proposed conservatee.

(d) If the proposed conservatee is a patient in or on leave of absence from a state institution under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services and that fact is known to the petitioner, the petition shall state that fact and name the institution.

(e) The petition shall state, so far as is known to the petitioner, whether or not the proposed conservatee is receiving or is entitled to receive benefits from the Veterans Administration and the estimated amount of the monthly benefit payable by the Veterans Administration for the proposed conservatee.

(f) The petition may include an application for any order or orders authorized under this division, including, but not limited to, orders under Chapter 4 (commencing with Section 1870).

(g) The petition may include a further statement that the proposed conservatee is not willing to attend the hearing

on the petition, does not wish to contest the establishment of the conservatorship, and does not object to the proposed conservator or prefer that another person act as conservator.

(h) In the case of an allegedly developmentally disabled adult the petition shall set forth the following:

(1) The nature and degree of the alleged disability, the specific duties and powers requested by or for the limited conservator, and the limitations of civil and legal rights requested to be included in the court's order of appointment.

(2) Whether or not the proposed limited conservatee is or is alleged to be developmentally disabled.

Reports submitted pursuant to Section 416.8 of the Health and Safety Code meet the requirements of this section, and conservatorships filed pursuant to Article 7.5 (commencing with Section 416) of Part 1 of Division 1 of the Health and Safety Code are exempt from providing the supplemental information required by this section, so long as the guidelines adopted by the State Department of Developmental Services for regional centers require the same information which is required pursuant to this section.

Enacted Stats 1990 ch 79 § 14 (AB 79), operative July 1, 1991. Amended Stats 1991 ch 82 § 8 (SB 896), effective June 30, 1991, operative July 1, 1991.

**§ 1872. Effect of conservatorship on legal capacity of conservatee**

(a) Except as otherwise provided in this article, the appointment of a conservator of the estate is an adjudication that the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate.

(b) Except as otherwise provided in the order of the court appointing a limited conservator, the appointment does not limit the legal capacity of the limited conservatee to enter into transactions or types of transactions.

Enacted Stats 1990 ch 79 § 14 (AB 759), operative July 1, 1991.

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**EXHIBIT 3**

**§ 372. Minors, incompetent persons or persons for whom conservator appointed; appearance by guardian, conservator or guardian ad litem; powers; disposition of money recovered; waiver of juvenile law rights**

When a minor, an incompetent person, or a person for whom a conservator has been appointed is a party, such person shall appear either by a guardian or conservator of the estate or by a guardian ad litem appointed by the court in which the action or proceeding is pending, or by a judge thereof, in each case. A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted, or by a

judge thereof, expedient to appoint a guardian ad litem to represent the minor, incompetent person, or person for whom a conservator has been appointed, notwithstanding that such person may have a guardian or conservator of the estate and may have appeared by the guardian or conservator of the estate. The guardian or conservator of the estate or guardian ad litem so appearing for any minor, incompetent person, or person for whom a conservator has been appointed shall have power, with the approval of the court in which the action or proceeding is pending, to compromise the same, to agree to the order or judgment to be entered therein for or against the ward or conservatee, and to satisfy any judgment or order in favor of the ward or conservatee or release or discharge any claim of the ward or conservatee pursuant to such compromise. Any money or other property to be paid or delivered pursuant to the order or judgment for the benefit of a minor, incompetent person, or person for whom a conservator has been appointed shall be paid and delivered as provided in Chapter 4 (commencing with Section 3600) of Part 7 of Division 4 of the Probate Code.

Where reference is made in this section to "incompetent person," such reference shall be deemed to include "a person for whom a conservator may be appointed."

Nothing in this section or in any other provision of this code, the Probate Code, or the Civil Code is intended by the Legislature to prohibit a minor from exercising an intelligent and knowing waiver of his constitutional rights in any proceedings under the Juvenile Court Law Chapter 2 (commencing with Section 500) of Part 1, of Division 2 of the Welfare and Institutions Code. *(Enacted 1872. Amended by Code Am. 1873-74, c. 383, § 38; Code Am.*

*1880. c. 68, § 2; Stats. 1913, c. 202, § 1; Stats. 1933, c. 744, § 1; Stats. 1939, c. 313, § 1; Stats. 1951, c. 1737, § 43; Stats. 1953, c. 1315, § 1; Stats. 1961, c. 721, § 1; Stats. 1963, c. 127, § 4; Stats. 1967, c. 1259, § 1; Stats. 1979, c. 730, § 19.)*

**§ 416.70. Wards and conservatees**

A summons may be served on a person (other than a minor) for whom a guardian, conservator, or similar fiduciary has been appointed by delivering a copy of the summons and of the complaint to his guardian, conservator, or similar fiduciary and to such person, but, for good cause shown, the court in which the action is pending may dispense with delivery to such person. *(Added by Stats. 1969, c. 1610, § 3. Amended by Stats. 1972, c. 579, § 15.)*

CERTIFICATE OF SERVICE

I hereby certify that on this first day of December, 1994, I served the within Affidavit of Ronald E. Guttman in Support of Motions to Dismiss on the plaintiffs and on the remaining defendants by sending copies thereof, by first-class mail, to Attorneys Beth George-Kane, Michael J. Flynn, Michael Tabb and Vincent H. Chieffo, all counsel to the plaintiffs, and to Attorneys William L. Chapman, Bruce Rich and Katherine J. Daniels, counsel to defendant HarperCollins Publishers.

/s/ Richard C. Gagliuso
Richard C. Gagliuso

cert.guttman

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
SOUTHERN DISTRICT

Docket #C-94-573-WS

Brother Records, Inc., et al.

V

HarperCollins Publishers, Inc., et al.

**AFFIDAVIT OF ELLIOTT LOTT IN OPPOSITION TO MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

I, Elliott Lott, hereby state and declare as follows:

1. I am the president of the plaintiff corporations in this action, Brother Records, Inc. ("BRI") and Brother Tours, Inc. ("BTI") I have been the president of BRI since 1988 and the president of BTI since it was created in 1991. BRI and BTI are the corporate entities through which the musical group, the Beach Boys, transact business. Among other things, BRI and BTI handle all revenues the Beach Boys receive from royalties, live performances, sales of Beach Boys' recordings, and sales of merchandise which bears the Beach Boys' logo. As the president of BRI and BTI have access to corporate records regarding these matters and rely on such records in the ordinary course of business. The information stated in this affidavit comes from my own personal knowledge as well as the corporate records referred to above.

2. BRI and BTI are close corporations the stock of which is held by each of the original Beach Boys Brian Wilson is a shareholder in BRI and BTI.

3. During the time the book "Wouldn't It Be Nice" was published and years immediately preceding its publication, the Beach Boys performed in New Hampshire on four occasions. In July 1989, they played in Manchester. In July 1991, they played in Nashua. In August 1992 they played in North Conway, followed by another date in Nashua. At each of these performances at least 8,000-10,000 New Hampshire residents came to see the band, except for the North Conway date, which attracted between 4,000-5,000 fans.

4. The Beach Boys received approximately $350,000 for these four dates in New Hampshire. During this period, Defendant Brian Wilson was entitled to receive between 20 to 25% of the Beach Boys' touring profits. Accordingly, Wilson would have received between 20 to 25% of the profits from the New Hampshire concerts.

5. The Beach Boys have recorded close to thirty albums. In addition there are approximately 20 other albums which have reconfigured the Beach Boys' recordings. All of these records are sold in New Hampshire on a daily basis, and to our knowledge thousands of Beach Boy records have been sold in New Hampshire. We do not have the exact figures on how many copies of which recordings have been sold in New Hampshire I believe this information is in the hands of the record companies, whose marketing figures we could get by subpoena if the court felt it was necessary. Brian Wilson receives a substantial percentage of the revenue the Beach Boys receive for record sales, and would regularly receive income due to record sales in New Hampshire.

6. Brian Wilson is a composer of many of the most famous Beach Boys songs. Songwriters receive a royalty every time a song is performed, including when the song is played on the radio or television. Beach Boys songs are a staple of radio stations. Beach Boys songs are regularly played on radio stations in New Hampshire, and every time one, which Brian Wilson wrote or co-wrote is played, he is entitled to a royalty. Wilson directly receives his songwriter royalties, so I cannot state how much income Wilson receives from his songs being played in New Hampshire.

7. In the late 1980s, Brian Wilson appointed Defendant Eugene Landy to be Brian's "Special Representative" to BRI. During this period, the members of the Beach Boys agreed that each members's special representative would be entitled to receive 1¼% of the gross touring revenues BRI received. Thus, during this period, Defendant Landy received 1¼% of the gross revenue BRI received from all Beach Boys performances in New Hampshire.

8. Being in the public eye for so many years, the Beach Boys recognize that negative publicity is a fact of life. The Beach Boys have never previously felt it necessary to file defamation suits against authors of untrue articles or works about the band. This is because in the past, negative pieces about the band have had no significant long term effect. But the publicity generated by Wilson and Gold's book, and Wilson's promotional tour in support of the book, had consequences unlike any publicity the Beach Boys have received in their lengthy career. Almost every summer, the Beach Boys tour the

United States. The summer tour is vital to the profitability of the band. Moreover because the Beach Boys have such a long history, and have maintained the same level of popularity over decades, the revenues and profits generated by the annual tours are predictable. Yet for the tour following the release of Wilson of Wilson and Gold's book. Summer 1992, profits were down sharply.

9. The lost touring profits were, in our opinion, related to the Wilson book and the publicity surrounding the book. Yet for a long time, the Beach Boys were unaware of the full extent of the effect of Wilson's book. It was only after the Summer 1992 tour ended, more than a year after the publication of the book, that we knew the 1992 tour was significantly different than prior tours. Prior to that we assumed that Wilson's book would simply have the fleeting, temporary effect that other negative publicity about the Beach Boys had had.

10. We are aware that Wilson went on a publicity tour to support the publication of the Book. This tour included interviews with national and regional reporters Wilson, for example, was broadcast on one of the national morning news shows. This show was broadcast into New Hampshire. We are aware that he was interviewed on radio stations that broadcast into New Hampshire and had interviews with newspapers, such as the Boston Globe, which are widely distributed in New Hampshire. In these promotional tours, Wilson repeated many of the assertions made in the book. We do not know exactly what media interviews were distributed in New Hampshire or if Wilson was interviewed by reporters or media persons who worked exclusively in New Hampshire. This information, however, is available from third parties, and

we would seek it through discovery if it is necessary to prove the defendants' contacts with new Hampshire.

11. For years the Beach Boys have played in New Hampshire and they expect to continue to perform at venues in New Hampshire. The Beach Boys have many loyal fans in that state. In fact, it is our understanding that when we played in Manchester a few years ago, we attracted one of the largest crowds for a rock concert in the state's history. The Beach Boys cherish their good reputation within the Granite State.

Signed under the pains and penalties of perjury in Fallbrook, California, this 27th day of December, 1994.

/s/ Elliott Lott
Elliott Lott

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the within Affidavit were mailed on December 28, 1994 to Richard Gagliuso, Esq. counsel to Defendants Brian Wilson, by and through Jerome S. Billet as Conservator of the Person and Estate of Brian D. Wilson, Todd Gold and Brains and Genius; William L. Chapman, Esq., Bruce Rich, Esq., and Katherine J. Daniels, Esq., counsel to Defendant Harper Collins Publishers, Inc. and Eugene Landy.

/s/ Michael Tabb
Michael Tabb

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
SOUTHERN DISTRICT

Docket #C-94-573-WS

Brother Records, Inc., et al.

V

HarperCollins Publishers, et al.

**Affidavit of Philip Stillman in Opposition to Defendants Motions to Dismiss for Personal Jurisdiction**

I, Philip Stillman, hereby state and declare as follows:

1. I am an attorney licensed to practice law in the states of California and Massachusetts. I am one of the attorneys for the plaintiffs in this action. Previously, I have represented Michael Love, one of the members of the Beach Boys in an action he brought against Harper-Collins Publishers, Inc., Brian Wilson and Todd Gold, *Love v. HarperCollins Publishers, Inc.*, No CV 92 6608 WJR, United States District Court for the Central District of Los Angeles. In that action Mr. Love brought a libel action based on passages contained in the book "Wouldn't It Be Nice". I have personal knowledge of the documents which were produced by the defendants in that action and the issues in that litigation.

2. Attached as Exhibit 1 to my affidavit is a true and correct copy of the agreement between Todd Gold and Brains and Genius which was produced by Defendant Gold in the *Love* libel action.

3. Attached as Exhibit 2 to my affidavit is a true and correct copy of the agreement between Harper & Row

Publishers, Inc. (the predecessor to HarperCollins Publishers, Inc.) and Brains and Genius which was produced by Defendant HarperCollins in the *Love* libel action.

4. Attached as Exhibit 3 to this affidavit is a true and correct copy of a document entitled "*Brian Wilson: Love and Mercy*, a Proposal by Brian Wilson and Todd Gold", which was produced by Defendant Gold in the *Love* libel case.

5. Attached as Exhibit 4 to this affidavit is a true and correct copy of the book jacket for "Wouldn't It Be Nice" by Brian Wilson and Todd Gold.

6. Attached as Exhibits 5 and 6 to this affidavit are true and correct copies of correspondence between Todd Gold and Tom Miller, a HarperCollins editor. Exhibit 5, which was produced by Gold in the *Love* libel suit, is a series of edits and suggested revisions HarperCollins wanted Gold to insert into the Book. Exhibit 6, which was produced by HarperCollins, are revisions Gold was submitting to HarperCollins concerning some sensitive sections in the Book. Some of the handwritten changes in Exhibit 6 were made by Wilson. In his deposition in the *Love* libel action, Wilson admitted he had made changes to the manuscript. This was not the only documentation produced by the defendants relating to the editing of the manuscript. There are hundreds of pages drafts and comments which were exchanged between Gold and HarperCollins' editors. In his deposition, Gold admitted that he was extensively involved in the editing the manuscript.

7. Attached as Exhibit 7 to this affidavit is a true and correct copy of the title page and copyright notice for the book "Wouldn't It Be Nice".

8. Brian Wilson's deposition was taken during the *Love* libel case. Wilson had the ability to recall about how the book was prepared and what actions he took regarding the book. Wilson's conservator did not seek an order precluding Wilson from testifying on the ground that he was not competent. Recently, Wilson testified at trial in another suit between Michael Love and Wilson, which was recently concluded in the Federal District Court in Los Angeles. In that case, in which I was also represented Mr. Love, the conservator, Jerome Billet, did try to get an order that Brian Wilson could not testify. The request was denied. Judge Rea found that notwithstanding the conservatorship, Wilson was competent to testify and Wilson, in fact, did testify at trial.

Signed under the pains and penalties of perjury this 28th day of December, 1994 in Boston, Massachusetts.

/s/ Philip Stillman
Philip Stillman

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BRAINS AND GENIUS,
A California General Partnership
c/o Mason and Gilbert, L.C.
1299 Ocean Avenue, Penthouse
Santa Monica, California 90401

Mr. Todd Gold
13916 Runnymede
Van Nuys, CA 91405

Dated as of October 1, 1989

Re: *Brian Wilson Autobiography/Collaboration Agreement*

Dear Todd:

The following is our understanding with respect to the services which you are to render to us in connection with the preparation of the proposed autobiographical book respecting certain events in the life story of Brian Wilson ("Wilson") (said book the "Autobiography").

1. We hereby engage you to assist us in the preparation of the Autobiography and you hereby accept such employment. Among your services hereunder will be, without limitation, to interview Wilson and others, including Dr. Eugene Landy ("Landy"), at mutually convenient times, to examine data which we, Wilson and/or Landy will make available to you, to do independent research wherever required by us, to organize the material, draw outlines, and to prepare manuscripts, revisions and drafts, including, without limitation, in connection with the hardback and paperback versions, for our, Wilson's and Landy's review and for submission to the publisher of the Autobiography (the "Publisher").

2. The term of your services hereunder (the "Term") shall commence us of the date hereof and shall continue until the general release of the Autobiography through

normal retail channels in the United States. It is the intention of the parties that the Autobiography will be approximately one hundred twenty-five thousand (125,000) words in length and that it will be completed on or before October 1, 1990, unless otherwise required by the terms and conditions contained in our agreement with the Publisher. You shall deliver all manuscripts, in completed and corrected form hereunder and galleys thereof to us and/or, at our direction, to the Publisher in sufficient time for us to meet our time schedules and designated deadlines.

3. All services to be rendered by you hereunder shall be done under our or our designee's direction and supervision. Drafts of successive portions of the Autobiography will be submitted to us for our consideration and shall be subject to our approval. We shall furnish the non-exclusive services of Wilson and/or Landy to make such writing and editorial contributions to the Autobiography and any manuscripts thereof as we may, in our sole discretion require. Without limiting the generality of the foregoing, we, Wilson and/or Landy shall be entitled to make and/or to or request that you make such changes, additions, and eliminations as we may desire or deem necessary, and you will promptly incorporate any such changes, additions and deletions and otherwise comply with such requests. It is our intention that all matters relating to the content and the preparation of the manuscripts for the Autobiography, including, without limitation, the content, final choice of title, illustrations and the like, as well as the manner of and timing of

publication of the Autobiography, and the choice of Publisher(s), shall be, as between you and us, within our exclusive control and discretion.

4. Wilson shall appear as the author of the Autobiography. Provided you are the sole collaborator on the Autobiography and are not in default hereof, we shall instruct the Publisher to accord you credit for your assistance in connection with the Autobiography as follows: "By Brian Wilson with Todd Gold". The format of the credit, the size, placement and all other matters with respect to your credit shall be left to our and/or the Publisher's discretion.

5. (a) You acknowledge and agree (as among you, Wilson and us) that: all of the results and proceeds of your services hereunder, shall, from the inception of its creation, be considered a "work made for hire" for us within the meaning of the U.S. Copyright Law. If it is determined that such results and proceeds do not so qualify, then such results and proceeds, together with all rights in it, shall be deemed irrevocably transferred to us or, at our election, to our designee(s) by this Agreement.

(b) In addition, for good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, we are the exclusive owner of all rights of whatever nature in and to the worldwide copyrights, (including all renewals and extensions thereof) in and to your life story insofar as it relates to Wilson, from the inception of your interaction and/or relationship and/or communications with us and/or Wilson and continuing in perpetuity (such life story rights and rights in and to

the results and proceeds of your services hereunder being hereinafter referred to as the "Property").

(c) The Property shall in all respects and from inception remain our sole and exclusive property in perpetuity, throughout the universe, free of any claim whatsoever by you or by any person deriving any rights or interest from you, your heirs, successors and assigns; and we shall have the right to secure the copyright in and to any or all of the Property in our or Wilson's name as the owner and author thereof and to secure any and all renewals of such copyright to the extent permitted by law.

(d) You shall execute and deliver to us or our designee such instruments of transfer and other documents regarding our rights in connection with your services hereunder, including, without limitation with respect to the Property) as we may request to carry out the purposes of this paragraph, including, without limitation, the Declaration of Collective Work and Power of Attorney which is attached hereto as Exhibit "A" and incorporated herein by this reference, and the Employment Eligibility Verification Form (Form I-9) attached hereto as Exhibit "B" and incorporated herein by this reference. You hereby irrevocably appoint us as your lawful attorney-in-fact to sign such documents in your name and to make appropriate disposition of them as we shall in our sole discretion deem necessary if and when you fail to so sign such documents within ten (10) business days after our request therefor. As between you and us, we shall have the sole and exclusive right to use and disseminate and to authorize the use and dissemination

of the Property or any part thereof throughout the universe in perpetuity, in any manner and by any means, whether now or hereafter known, devised or developed.

6. Provided that you have rendered all of the services required of you hereunder and are not in default hereof, you shall be entitled to receive, as full and complete consideration for all of your services rendered and obligations hereunder and all rights granted by you hereunder, a sum equal to one-third (1/3) of all "Net Income" (as hereinafter defined) actually earned and received by us (including, but not limited to, advances against and in reduction of royalties) derived solely and directly from "Book Activities (as hereinafter defined). The term "Net Income", as used herein, shall mean all gross compensation derived from the exploitation hereunder of Book Activities, less any and all direct costs and expenses incurred by us in connection with the preparation of the Autobiography including, without limitation, the agency commission payable to the William Morris Agency in paragraph 9 hereinbelow, and any attorney's fees and costs whether or not in connection with litigation (expressly excluding any such costs incurred by us in the negotiation of this agreement, Exhibit "C" and our agreement with Publisher). The term "Book Activities", as used herein, shall mean the sale, lease, license or other disposition of any and all (i) print publication rights in the Autobiography of whatever kind or nature, including hard cover and paperback rights, book club, translation, serialization, books on tape, and foreign publication and foreign language publications, of the Autobiography; and/or (ii) rights for theatrical motion pictures and television "movies of the week" (including videocassette

rights) which are specifically based on the Autobiography and which are produced pursuant to an option or purchase agreement(s) granting motion picture/television rights derived from the Autobiography ("Optioned Movies"), but specifically excluding rights in, to and with respect to that certain autobiographical motion picture project presently at Paramount Pictures Corporation. It is expressly understood and agreed that the term "Book Activities", as used herein, shall expressly exclude, without limitation: the sale, lease, license or other disposition of any and all non-print publication rights in the Autobiography (other than specifically provided above) of whatever kind or nature such as, by way of example only and without limitation, dramatic rights, allied motion picture rights, educational picture rights, soundtrack rights, radio rights, live television, stage, merchandising, and commercial tie-up rights, now or hereafter known, whether or not rights based on or incorporating, in whole or in part, Wilson's life story or any part thereof, and any other disposition of rights in the Autobiography, and any and all compact disc and other digital recording rights, whether such technology is now or hereafter invented, if music, still pictures, moving pictures, videos or any other audio or pictorial representations are included in the compact disc/digital configuration (i.e., compact discs/digital configurations embodying only the retrieval of the print publications are not excluded from Book Activities). Payment to you of monies due to you hereunder shall be made within thirty (30) days after our receipt thereof from the applicable payor. Notwithstanding the provisions of this paragraph, and without limitation of our, Wilson's and Landy's rights hereunder, you shall have no

voice in any arrangements for the publication of the Autobiography or the sale or other disposition of any rights therein.

7. If you die or become incapacitated before the completion of the galley for the Autobiography, all material pertaining thereto in your possession shall be turned over to us forthwith; and, provided you are not in default hereof, we agree to pay you or to your estate, in lieu of the compensation set forth in paragraph 6 above, an amount to be determined between us and your estate in the manner described in subparagraph 8(b) hereinbelow.

8. (a) We shall have the right, for any reason whatsoever in our sole judgment and discretion, to terminate our obligations hereunder and to make such dispositions and decisions regarding the disposition of the Autobiography including, without limitation: (i) to make other arrangements for literary assistance at any time if we are not satisfied with the way the Autobiography is progressing; and/or (ii) not to publish the Autobiography.

(b) If such termination is for other than default and the Autobiography is thereafter published, the amount of compensation, if any, payable to you (or to be retained by you from monies already received) shall be determined by mutual agreement between you and us to be such percentage of the amount otherwise payable to you pursuant to paragraph 6 hereinabove as may be fair and reasonable under the circumstances taking into consideration the amount and character of work actually performed by you hereunder, and the amount of your material that appears in the published version of the Autobiography, with the understanding, however, that in

the event you and we are unable to agree with respect to such percentage despite good faith negotiations, then said matters shall be submitted to and determined by arbitration by a mutually agreeable arbitrator in Los Angeles, pursuant to the rules of the Los Angeles American Arbitration Association.

(c) Provided you are not in default hereof the amounts, theretofore received by you shall be an advance against any other amounts determined to be due to you pursuant to subparagraph 8(b) above and you shall immediately remit any excess amounts over the amount so determined. The amount determined to be due to you pursuant to subparagraph 8(b) above shall constitute full and complete consideration for your services rendered hereunder, and neither you nor anyone claiming through or deriving rights from you shall have any other claim of any kind or nature or any other interest in the Autobiography or the concept therefor or in any materials you have prepared hereunder. If we decide to make other arrangements for literary assistance, we shall give you at least two (2) weeks' notice thereof in writing.

9. You and we hereby agree that the William Morris Agency is being engaged as the exclusive agent for the procurement of a Publisher and publishing agreement for the Autobiography and that the William Morris Agency shall be entitled to receive commissions in connection therewith upon the terms and conditions set forth in Exhibit "C" attached hereto and incorporated herein by this reference.

10. We may terminate your services at any time upon written notice to you, upon default of your obligations under this agreement. In the event of such termination "for cause," then, without limiting your other rights and remedies, we shall have no further obligation to pay you any compensation hereunder. As used herein, the term "for cause" shall include, without limitation, the following: (i) your conviction of a misdemeanor involving moral turpitude or any felony; (ii) your engaging in a prohibiting conflict of interest hereunder, or publicly disclosing confidential information in violation of this agreement or publicly rebuking, maligning or defaming us, Wilson, Landy or any of our affiliated entities; (iii) your undertaking of employment for a third party during the Term without our prior written approval; (iv) your failure or refusal without our consent for any reason other than sickness or disability to render services hereunder for a period in excess of ten (10) consecutive days, or by reason of sickness or disability for a period in excess of thirty (30) days in the aggregate; or (v) any material breach of any of your material obligations under this agreement; provided, however, that we shall not have the right to terminate you by reason of such material breach unless you fail to cure same within seven (7) days after your receipt of our written notice thereof.

11. (a) It is agreed that your services hereunder are on a non-exclusive, but first priority basis until such time as the Autobiography is first generally released throughout the United States through normal retail channels. You further agree that you shall not have the right to engage in any other business or to enter into any agreements pursuant to which you shall obtain any benefit

directly or indirectly, arising from or in connection with your services hereunder, other than as approved in writing by us.

(b) It is understood and agreed that in entering into this Agreement and providing your services hereunder, you have, and shall have, the status of an independent contractor. Nothing herein contained shall contemplate or constitute you our partner, joint venturer or agent. You acknowledge that your services hereunder are of a special, unique, extraordinary and intellectual character, the loss of which shall be irreparable and not reasonably compensated by damages in an action at law, and that we shall be entitled to injunctive and other equitable relief to enforce the provisions of this Agreement or to curtail any breach of this agreement by you, in addition to any other rights or remedies to which we may be entitled in such event.

(c) If you shall fail, refuse or neglect to perform any obligations hereunder whatsoever ("Event of Default"), we shall, in addition to our other rights and remedies, have the right to suspend our obligations hereunder for the duration of such Event of Default and/or to terminate this Agreement, and, in the event of such termination, be relieved of any executory obligations to you hereunder.

12. You hereby grant to us and our respective designees (including, but not limited to, Publisher) the right to use and to allow others to use and publish your name, biographical material and likenesses for purposes

of advertising and trade in connection with the Autobiography and/or the results and proceeds or your services pursuant to this agreement.

13. (a) You hereby acknowledge, stipulate and agree that any and all information obtained, learned or generated by you during the course of your employment hereunder (or prior hereto to the extent you obtained, learned or generated any information as a result of any contact or communication you had with or respecting us, Wilson or Landy prior to the date of this agreement) is strictly confidential ("Confidential Information") and is not to be disclosed by you directly or indirectly to any person or entity for any purpose, except in the ordinary course of business to our or Wilson's designated representatives who have been previously identified to you.

(b) You hereby acknowledge, stipulate and agree that the Confidential Information defined above is comprised of private facts; that unauthorized public disclosure of the Confidential Information would be offensive and objectionable to the reasonable person; and that the Confidential Information is not of legitimate public concern or newsworthy. You further acknowledge, stipulate and agree that any disclosure by or on behalf of you of any Confidential Information without our specific and express authorization in each instance in writing shall be included as an unauthorized public disclosure of the Confidential Information by you; that any unauthorized disclosure by you would be embarrassing, detrimental, humiliating and harmful to our and/or Wilson's and/or Landy's career and personal and professional image; that the harm to us, Landy and/or to Wilson could not be reasonably or adequately compensated by damages in an

action at law; and that we, Landy and Wilson would suffer irreparable injury. Accordingly, you hereby acknowledge, stipulate and agree as follows:

(i) We, Landy and Wilson shall be entitled to injunctive or other equitable relief to prevent any unauthorized disclosure of Confidential Information by you, to preserve the relationship created herein and to mandate compliance with the terms of this agreement;

(ii) If you indicate at any time that you do not intend to honor your obligation not to disclose the Confidential Information, such indication shall constitute a breach of your confidentiality agreement entitling us, Wilson and Landy to injunctive and other equitable relief; and

(c) Resort to injunctive or other equitable relief to prevent an unauthorized or threatened disclosure of Confidential Information by you shall not constitute a waiver of any other rights which we or Wilson may have for damages.

14. You hereby represent, warrant and agree, for the benefit of us, Wilson and Landy, that:

(a) you have a bona fide intention to write and cooperate with us, Wilson and Landy in the preparation of all manuscripts required by us for delivery to this Publisher.

(b) you have no other contractual commitments of any kinds which will or might conflict or interfere with the performance of your obligations hereunder.

(c) all material, written or furnished by you shall be your own research accurately based on information properly obtained during the course of your employment hereunder or shall be based on information supplied by us at our specific direction for publication in Autobiography, and shall not infringe upon or violate any copyright, proprietary right or the right of privacy or constitute a libel, slander against or violate any common law rights or other rights of any person, firm or entity.

(d) you will indemnify and hold us, Wilson, Landy and our respective successors, executors, administrators and assigns harmless from any and all claims, demands, suits, losses, costs, expenses (including reasonable attorneys' fees and costs) by reason of any breach or claim of breach of this or any other agreement, this representations, warranties or covenants therein contained. You shall promptly notify us of any such claim, action or proceeding of which you become aware.

All warranties and representations hereunder shall survive the termination of this agreement.

15. We will indemnify you and hold you harmless from any and all claims, demands, suits, losses, costs, expenses incurred by you by reason of any claims directly arising from any material furnished by us, Wilson or Landy to you in the preparation of the Autobiography, which material has been specifically and expressly authorized by us for publication in the Autobiography.

16. Each party hereto stipulates that it has been represented by and has relied upon counsel of its own choosing in the negotiations for the preparation of this agreement, and that it has read this agreement, has had

its contents fully explained to it by such counsel, and is fully aware of and understands all of its terms and the legal consequences thereof.

17. This agreement shall inure to the benefit of and be binding upon us and our successors, licensees and assigns. Neither this agreement, nor any of your duties hereunder shall not be assigned or delegated, in whole or in part.

18. All notices and other communications hereunder shall be in writing and shall be given by hand delivery to the other party or by registered or certified mail, return receipt requested, postage prepaid, at the respective address indicated on the first page hereof or to such other address as either party shall give notice to the other in writing. Notices shall be deemed given when deposited in the mails. A courtesy copy of all notices to you shall be sent to: Dan Strone, Esq., William Morris Agency, 151 El Camino, Beverly Hills 90212. A courtesy copy of all notices to us shall be sent to Mason and Gilbert, 1299 Ocean Avenue, Penthouse, Santa Monica, California 90401; Attention: John Mason, Esq.

19. (a) All prior understandings, agreements and arrangements (whether written, oral or implied) between you and us, Wilson and/or Landy, if any, are terminated as of the date of this agreement and are hereby merged herein.

(b) This agreement sets forth the entire understanding between us; there are no terms conditions representations warranties or covenants other than those set forth herein. No term or provision of this agreement may be amended, waived released, discharged or modified in

any respect except in writing, signed by the party to be charged. No waiver or any breach or default shall constitute a waiver of any other breach or default, whether or not similar. A delay or failure to assert rights or a breach of this agreement shall not be deemed to be a waiver of such rights either with respect to that breach or any subsequent breach.

(c) The invalidity or unenforceability of any provision of this agreement shall not affect the validity or enforceability of any other provision of this agreement.

(d) Neither party hereto shall hold itself out contrary to the terms of this agreement, and neither you nor we shall become liable for any representation, act or omission of the other contrary to the provisions hereof. This agreement shall not be deemed to give any right or remedy to any third party whatsoever unless said right or remedy is specifically granted hereunder.

(e) This agreement shall be governed by and construed in accordance with the laws of the State of California applicable to agreements made and to be wholly performed therein.

(f) You hereby agree to execute any further documents and do any and all acts necessary or appropriate to fully effectuate the terms and provisions of this agreement and to permit us to comply with the terms and conditions of our agreements with third parties.

(g) No breach or alleged breach by us, Landy and/or Wilson of any of our obligations hereunder shall entitle you to recover damages, or affect any of your

obligations hereunder, unless we shall have failed to remedy such breach or alleged breach within thirty (30) days following receipt of your written notice specifying such breach or alleged breach, and no alleged breach shall be deemed incurable. In no event whatsoever shall you have any right to seek or obtain injunctive or equitable relief against us, Wilson, Landy, the Publisher or any of the respective officers, directors, licensees, successors and assigns of any of the foregoing. We hereby acknowledge that you wrote certain unpublished notes for then potential article for *PEOPLE* magazine, pursuant to the terms of your employment and that *PEOPLE* magazine owns said notes as your employer.

If the foregoing correctly reflects the understanding and agreement between us with respect to the subject matter hereof, please so indicate by signing your name in the space provided below.

Sincerely,

BRAINS AND GENIUS,
a California General
Partnership

By: /s/ Brian Wilson
Its: General
Partner

AGREED TO AND ACCEPTED:

/s/ Todd Gold
Todd Gold
d:\wilson\toddk

SSAN: 314-50-8590

AGREEMENT made this 18th day of May, 1990, between

BRAINS & GENIUS
c/o William Morris Agency
1350 Avenue of the Americas
New York, N.Y. 10019

("the Proprietor") and HARPER & ROW, PUBLISHERS, INC., of 10 East 53rd Street, New York, New York 10022 ("the Publisher") with reference to the work tentatively titled

LOVE AND MERCY
By Brian Wilson with Todd Gold

("the Work").

WHEREBY, in consideration of the promises set forth in this Agreement, the Proprietor and the Publisher agree that:

1. GRANT

The Author grants to the Publisher the exclusive right to print, publish and sell the Work in book form in the English language and to exercise and grant to third parties the rights to the Work described in Paragraph 6 throughout the United States, its territories, dependencies and possessions, Canada, the Philippine Islands and the non-exclusive right to do so throughout the rest of the world with the exception of the countries listed on Schedule A to this Agreement ("the Territory") for the full term of copyright available to the Work in the Territory.

2. MANUSCRIPT DELIVERY

(a) The Proprietor shall deliver to the Publisher by January 15, 1991 one copy of the complete manuscript for

the Work approximately 100,000 - 125,000 words in length and acceptable to the Publisher in content and form. If the complete manuscript delivered by the Proprietor is not acceptable to the Publisher, the Publisher shall give the Proprietor a request for changes and revisions. The Proprietor shall have 90 days from the Proprietor's receipt of such a request to deliver to the Publisher a revised manuscript for the Work that is acceptable to the Publisher.

(b) The Proprietor shall at the Proprietor's expense obtain and deliver to the Publisher with the complete manuscript written permissions deemed necessary by the Publisher for any quotations from other sources included in the Work by the Proprietor and 40-50 black and white mutually agreed upon photographs and written permission for their use as part of the Work. If the Proprietor fails to obtain such items, the Publisher may obtain them and charge the costs incurred to the Proprietor's royalty account.

(c) The Proprietor and the Publisher shall mutually agree on whether an index is required for the Work. If they agree an index is required, the Proprietor shall have the first opportunity to prepare one. If the Proprietor does not want to do so, or if the Proprietor elects to do so but does not prepare an index in a timely manner, the Publisher may have an index prepared and charge the costs incurred, but not to exceed $1,000.00, to the Proprietor's royalty account.

(d) The Proprietor will not agree to deliver a manuscript for another book by Brian Wilson to another publisher if the delivery of such manuscript would

jeopardize the Proprietor's obligation to meet the delivery date in Paragraph 2.(a). The Proprietor agrees to notify the Publisher before doing so if the Proprietor plans to enter an agreement with another publisher for a work by Brian Wilson prior to the delivery of a complete manuscript for the Work under the terms of this Agreement.

3. EDITING AND PROOFS

(a) After the Work has been accepted by the Publisher, no material change may be made without the Proprietor's approval. However, the Publisher may copyedit the Work in accordance with its standards of punctuation, spelling, capitalization and usage. The Publisher shall send the copyedited manuscript to the Proprietor, who shall make any revisions and corrections and return it within two weeks of receipt.

(b) The Proprietor shall review and return within two weeks of receipt proofs or other production materials submitted by the Publisher. The Proprietor shall pay all charges in excess of 10% of the cost of composition for changes (other than corrections of printer's errors or changes made at the Publisher's request) that the Proprietor makes in the Work after type has been set in conformity with the copyedited manuscript and all charges for changes requested by the Proprietor in second or subsequent printings. These costs shall be charged to the Proprietor's royalty account, except the Proprietor shall upon request pay directly such charges that are in excess of 15% of the original cost of composition. The Publisher shall show the Proprietor the design of the book pages prior to publication of the Work.

4. PUBLICATION

(a) The Publisher shall publish a hardcover edition of the Work (which shall be the initial edition) in such style and manner as the Publisher deems appropriate within 12 months from the date of the Publisher's acceptance of the Work, provided the Proprietor has complied with Paragraphs 2.(b) and 3 and has responded in a satisfactory way to any requests made under Paragraph 9.(d). Except as provided in Paragraph 4.(d), all details of publication, including manufacture, format and design, distribution, pricing, advertising and promotion and distribution of free copies, shall be determined by the Publisher.

(b) The Publisher shall give the Proprietor 25 copies of each of the Publisher's editions of the Work on publication of each. The Proprietor may purchase additional copies at a discount of 50% for personal use, but not for resale. The Publisher shall use its best efforts to obtain for the Proprietor 25 copies of any rack-size paperback edition of the Work licensed for publication by the Publisher.

(c) The title of the Work shall be LOVE AND MERCY unless the Publisher and the Proprietor mutually agree otherwise.

(d) The Proprietor shall approve the jacket design and jacket copy of the Work, publicity press kits and promotional material for the Work.

(e) The Proprietor represents that Brian Wilson shall initially participate in a four-week author promotion tour covering a minimum of twelve cities during the one month period immediately following the Publisher's first

publication of the hardcover edition of the Work. If Brian Wilson is not available to participate in such a promotional tour at the time the Publisher desires to publish the Work, the Publisher may postpone publication until such time as Brian Wilson is available. At the Publisher's request, Brian Wilson shall also participate in a satellite tour (e.g. Brian Wilson sitting in a studio responding to questions being asked from interviewers in different cities throughout the United States and Canada), appearances on major network TV shows and at the American Booksellers Association convention. Brian Wilson shall also participate in a three-week author promotion tour during the one month following the Publisher's first publication of the rack-size paperback edition of the Work. Schedules for all such promotion tours shall take into account Brian Wilson's professional commitments. All first class expenses incurred by Brian Wilson in connection with such promotional tours, including two hotel suites, two first-class airplane tickets and one limousine in tour cities shall be paid for by the Publisher. The Publisher shall also pay for one coach airplane ticket in connection with said tours. The Publisher shall consult with Brian Wilson regarding choice of, radio and TV shows, and press interviews. If the Publisher publishes a trade paperback edition of the Work, Brian Wilson shall participate in an author promotion tour during the one month following the Publisher's first publication of such trade paperback edition according to a schedule to be mutually agreed upon. Brian Wilson will be consulted prior to the selection of hotels and ground transportation to be provided during the tour, and the Publisher shall

give due consideration to his requests. However, the Publisher shall make all final decisions regarding such hotels and transportation. It is acknowledged that the Proprietor's promise to have Brian Wilson personally perform the foregoing promotional and publicity activities has been a material inducement to the Publisher to enter into this Agreement and constitutes an essential part of the consideration provided to the Publisher hereunder.

The above tour shall be coordinated with Rogers and Cowan and the Proprietor shall pay all costs for the participation of Rogers and Cowan in connection with such tour.

5. ROYALTIES

(a) The Publisher shall pay to the Proprietor royalties on sales, less returns, of copies of the Publisher's editions of the Work as follows:

(1) on all hardcover copies sold through ordinary channels of trade in the United States (except as otherwise provided below), [Redaction In Exhibit] of the suggested customer's price.

(2) on all hardcover copies sold in the United States at discounts higher than the Publisher's announced discounts for wholesale and retail accounts in the booktrade and (i) on a non-returnable basis; or (ii) as special sales, as premiums, to catalog accounts, to book fairs or outside the ordinary channels of the book trade, [Redaction In Exhibit] of the amounts received by the Publisher;

(3) on all hardcover copies sold outside the United States or for export to Canada or to other countries throughout the territory, [Redaction In Exhibit] of the amounts received by the Publisher;

(4) or all trade size paperback copies sold through ordinary channels of trade in the United States (except as otherwise provided below) the following percentages of the suggested customer's price;

(A) 1 to 50,000 copies: [Redaction In Exhibit]

(B) in excess of 50,000 copies: [Redaction In Exhibit]

(5) on all trade-size paperback copies sold in the United States at discounts higher than the Publisher's announced discounts for wholesale and retail accounts in the book trade and (i) on a non-returnable basis; or (ii) as special sales, as premiums, to catalog accounts, to book fairs or outside of the ordinary channels of the book trade, [Redaction In Exhibit] of the amounts received by the Publisher;

(6) on all trade-size paperback copies sold outside the United States or for export to Canada or to other countries throughout the Territory, [Redaction In Exhibit] of the amounts received by the Publisher;

(7) on all rack size paperback copies sold through ordinary channels of trade in the United States (except as otherwise provided below) the following percentages of the suggested customer's price;

(A) 1 to 150,000: [Redaction In Exhibit]

(B) in excess of 150,000: [Redaction In Exhibit]

(8) on all rack-size paperback copies sold in the United States at discounts higher than the Publisher's announced discounts for wholesale and retail accounts in the book trade and (i) on a non-returnable basis; or (ii) as special sales, as premiums, to catalog accounts, to book fairs or outside of the ordinary channels of the book trade, [Redaction In Exhibit] of the amounts received by the Publisher;

(9) on all rack-size paperback copies sold outside the United States or for export to Canada or to other countries throughout the Territory, [Redaction In Exhibit] of the amounts received by the Publisher;

(10) on all copies of the Publisher's editions of the Work sold directly by the Publisher to consumers in response to mail order or other direct-response solicitations sponsored by the Publisher, [Redaction In Exhibit] of the price paid by the consumer, exclusive of shipping and handling charges;

(11) on all copies sold as remainders at more than the cost of manufacture, [Redaction In Exhibit] of the amounts received by the Publisher; (The Publisher shall use its best efforts to give the Proprietor notice of the Publisher's intention to remainder copies of the Work and give the Proprietor a reasonable opportunity to purchase copies at the best remainder price; however, the Publisher's failure to do so shall not be considered a breach of this Agreement nor give the Proprietor any claim for damages.)

(12) on copies given to or sold to the Proprietor, given away to promote sales or to charitable institutions, sold at or below the cost of manufacture or damaged or destroyed, no royalties shall be paid.

(13) For purposes of the foregoing provisions, "suggested customer's price" shall mean the price printed on copies of the work printed by the Publisher.

(b) Only copies sold under 5.(a)(4) shall be counted in determining the royalty escalations described in 5(a)(4).

(c) As an advance against all royalties and all proceeds from the disposition of subsidiary rights due the Proprietor under this Agreement, the Publisher shall pay to the Proprietor the sum of [Redaction In Exhibit] payable:

| | | |
|---|---|---|
| (1) | [Redaction In Exhibit] | upon execution of this Agreement; |
| (2) | [Redaction In Exhibit] | upon Publisher's acceptance of one-half of the manuscript for the Work; |
| (3) | [Redaction In Exhibit] | upon the Publisher's acceptance for publication of the complete and final manuscript for the Work; and |
| (4) | [Redaction In Exhibit] | upon completion of the promotion tour for the hardcover edition of the Work by Brian Wilson pursuant to Paragraph 4.(e). |

6. SUBSIDIARY RIGHTS

(a) The subsidiary rights to the Work granted to the Publisher, and the allocation of proceeds received by the Publisher from the grants of such rights to third parties are:

| | Proprietor's Percentage | Publisher's Percentage |
|---|---|---|
| (1) periodical or newspaper publication prior to book publication; | 90 | 10 |
| (2) periodical or newspaper publication following book publication, including syndication rights; | 50 | 50 |
| (3) permissions, including publication of portions of the Work in anthologies; | 50 | 50 |
| (4) condensations and abridgements; | 50 | 50 |
| (5) book club publication; | 50 | 50 |
| (6) publication of editions for premium or special use or for direct sale to consumers; | 50 | 50 |
| (7) paperback reprint editions; subject to the Proprietor's approval; | 50 | 50 |
| (8) hardcover reprint editions; | 50 | 50 |

| | | |
|---|---|---|
| (9) subject to the Proprietor's sole prior approval, which approval may be withheld in the Proprietor's discretion, the right to record and transmit the verbatim text of the Work or parts of the Work by any means, electronic or otherwise, the result of which serving as a substitute for sales of the Work in book form; (In no event will the foregoing grant of rights be interpreted as a grant to the Publisher of audio recording rights, nor will these reproductions be on compact disc or contain music). | 50 | 50 |
| (10) Braille, large-type and other editions for the handicapped (the Publisher may grant such rights to recognized non-profit organizations for the handicapped without charge and without payment to the Proprietor); | 50 | 50 |

(b) If the Publisher itself desires to exercise any of the rights described above (as opposed to licensing such rights to third parties), other than those rights for which royalty rates are already provided in Paragraph 5 hereof, the Publisher shall obtain the Proprietor's approval of the exercise of any such right by the Publisher and the royalties payable to the Proprietor on such exercise shall be mutually agreed upon. In the event that the Publisher and Proprietor cannot agree on such royalty, the Publisher may not exercise such rights.

7. ACCOUNTING

(a) Following first publication of the Work by the Publisher, an accounting of all of the Proprietor's earnings under the terms of this Agreement, accompanied by payment of amounts due on such accounting, shall be rendered no later than April 1 and October 1 of each year for the periods ending the preceding December 31, and June 30, respectively.

(b) The Publisher may retain a reasonable reserve against returns on any accounting statement, provided the amount of the reserve held is clearly indicated and provided the subsequent statement clearly indicates how such reserve has been applied. Any reserve held shall be related to sales and returns of the Work during the accounting period for which the reserve is held and the Publisher's reasonable expectation of sales and returns at the time the accounting statement for such period is prepared. On request, the Publisher shall provide a written explanation of any reserve.

(c) If the Proprietor receives an overpayment of royalties because of copies reported sold but subsequently returned, the Publisher may deduct the amount of the overpayment from further sums due the Proprietor under this Agreement. If any such overpayment is not recouped in two accounting periods, the Proprietor, upon request, shall pay the Publisher the unrecouped portion of the overpayment.

(d) Any sums owned by the Proprietor to the Publisher under Paragraph 7.(c) or 14.(a) may be deducted from any amounts due the Proprietor by the Publisher under any other agreement between them.

(e) The Publisher shall upon request pay to the Proprietor the Proprietor's share of subsidiary rights payments received by the Publisher pursuant to Paragraph 6 within 30 days of the Proprietor's request for such payment provided the following conditions are met:

(1) advances and other valid charges pursuant to Paragraphs 2.(b), 2.(c), 3.(b), 7.(c) and charges for copies of book puchases [sic] to the Proprietor's account permitted by the terms of this Agreement have been recouped by the Publisher from all earnings, including the Proprietor's share of subsidiary rights payments, credited to the Proprietor's account hereunder; and

(2) the Proprietor's share of a payment as to which a request is made is $5,000.00 or more.

8. RIGHT TO AUDIT

(a) Upon written request from the Proprietor, the Publisher shall provide the following information: the number of copies of each edition of the Work printed by

the Publisher; the date of each printing; the cumulative number of copies sold, returned, distributed free of charge, remaindered, destroyed or lost; copies of any licenses made by the Publisher; and any other information the Proprietor may reasonably request on the basis that it is required in order to ascertain the accuracy of accountings rendered. The Publisher shall use its best efforts to obtain the number of copies of the Work printed pursuant to any subsidiary rights licenses that it may enter into.

(b) The Proprietor may upon written notice examine the Publisher's records relating to the Work during normal business hours under such conditions as the Publisher may reasonably prescribe. If an error is discovered as a result of any such examination, the party in whose favor the error was made shall promptly pay the other the amount of the error. Any such examination shall be at the Proprietor's expense unless errors of accounting in the Publisher's favor amounting to 5% or more of the total sum paid to the Proprietor under this Agreement are found, in which event the Publisher shall contribute to the cost of the examination up to the amount of the error determined as a result of the examination.

9. WARRANTIES

(a) The Proprietor warrants to the Publisher that:

(1) the Proprietor is the sole proprietor of the Work and sole owner of the rights granted in this Agreement, has a valid and existing agreement with Brian Wilson and Todd Gold to write the Work, has not

assigned, pledged or otherwise encumbered them and has the right to enter this Agreement;

(2) the Work is an original work, has never before been published in whole or in part in any form in the Territory, is not in the public domain in any country in the Territory and does not infringe any copyright or any other proprietary or personal right; and

(3) the Work contains no material that is libelous, in violation of any right of privacy or publicity, or harmful so as to subject the Publisher to liability to any third party or otherwise contrary to law.

INDEMNITIES

(b) The Proprietor shall indemnify the Publisher from any loss, damage, expense (including attorneys' fees), recovery or judgment arising from any breach or alleged breach of any of the Proprietor's warranties, subject to the limitations stated below.

(1) Each party shall promptly inform the other of any claim made against either which, if sustained, would constitute a breach of any warranty made by the Proprietor to the Publisher in this Agreement. The Publisher shall defend any such claim made against the Publisher with counsel of the Publisher's selection. The Publisher shall consult with the Proprietor regarding the selection of such counsel. The Proprietor shall fully cooperate with the Publisher in such defense and may join in such defense with counsel of the Proprietor's selection at the Proprietor's expense.

(2) After consultation with the Proprietor and serious consideration of any objections the Proprietor

may have, the Publisher may settle any such claim made against the Publisher. The Proprietor and the Publisher shall attempt to agree in writing on the percentage of settlement costs which each shall bear. Failing such agreement, the Publisher shall retain any remedies available to it based on the Proprietor's breach of any warranty made by the Proprietor in this Agreement but can only recover from the Proprietor amounts paid in settlement by the Publisher if the Publisher can establish that such settlement costs were paid because of a breach of warranty made by the Proprietor in this Agreement. Alternatively, the Proprietor may, at the Proprietor's discretion, provide security reasonably acceptable to the Publisher for the further costs of defending the claim, in which event the Publisher shall not settle without the Proprietor's written consent.

(3) If any such claim is successfully defended, the Proprietor's indemnity shall be limited to 50% of the costs (including attorneys' fees) incurred by the Publisher in the defense of the claim.

(4) If any such claim is made, the Publisher may withhold a portion of payments due the Proprietor under this Agreement to cover the Proprietor's obligations stated above. (Amounts withheld shall be reasonably related to the Publisher's reasonable assessment of the damages claimed and of the anticipated defense costs.) The Publisher shall deposit monies so withheld in an interest-bearing account pending disposition of the claim; monies withheld and the interest thereon will be first applied to satisfy the Proprietor's obligation to indemnify the Publisher, and the balance remaining shall

be promptly remitted to the Proprietor after the disposition of the claim or after the claim has in the Publisher's good faith opinion been abandoned. If amounts are withheld under this provision on account of a claim, but a litigation based on the claim is not commenced within one year of the date of receipt of such claim, withheld amounts shall be released unless at the end of such year settlement discussions are being actively conducted or the claim is being actively defended by correspondence, in which event amounts may continue to be withheld, but for no more than an additional six months.

(c) The Proprietor shall be responsible for any claims made against any third party to which the Publisher grants subsidiary rights to the Work to the same extent as the Proprietor is responsible to the Publisher under the indemnification provisions of this Agreement. The warranties and indemnities made by the Proprietor in this Agreement shall survive the termination of this Agreement.

(d) At or about the time the Publisher copyedits the Work, the Publisher may have the Work read by the Publisher's counsel at the Publisher's expense. If the Proprietor makes changes in the Work as are recommended by the Publisher's counsel, the Proprietor's indemnity for a judgment shall be limited to 50% to the extent that such judgment arises from a matter within the scope of the review by the Publisher's counsel and as to which the Proprietor made full disclosure to the Publisher. If the Proprietor will not make changes recommended by the Publisher's counsel, the Publisher shall not be required to publish the Work and shall have the right to recover from the Proprietor any advances made

to the Proprietor under this Agreement. When such advances are fully repaid, this Agreement shall terminate.

10. RESERVED RIGHTS

(a) All rights to the Work not granted to the Publisher in this Agreement are reserved by the Proprietor. In exercising such rights, the Proprietor shall reserve for the Publisher's benefit the rights granted to the Publisher in this Agreement and, in addition, shall comply with the following:

(1) In connection with the Proprietor's disposition of reserved first serial rights, the Proprietor shall consult with the Publisher about the timing of first serial publication and the portion of the Work that is to be used first serially. The Proprietor shall endeavor to require any licensee of such rights to carry a credit to the publication of the Work by the Publisher.

(2) In connection with the Proprietor's disposition of reserved motion picture, television, radio, live-stage dramatic adaptation or audio-visual adaptation rights, the Proprietor shall not make any grant of print rights without the Publisher's written consent not to be unreasonably withheld and shall in no event make any grant of novelization or photonovel or similar rights. The Publisher wili consent to the publication of synopses of motion picture and television dramatic adaptations of the Work, and photonovels (being defined as a publication that tells the narrative story of the work or a dramatic adaptation of the Work) based thereon, provided no such synopsis exceeds 10,000 words in length, no such synopsis or photonovel is offered for sale (except as it may

appear in motion picture-television fan magazines or souvenir programs) and each such synopsis or photonovel is published with an appropriate copyright notice.

NON-COMPETITION

(b) For a period of time commencing on the signing of this Agreement and ending three years after the first publication of the Work, the Proprietor and Brian Wilson shall not without the Publisher's written consent, not to be unreasonably withheld, publish another biography of Brian Wilson or autobiographical work by Brian Wilson.

11. COPYRIGHT

(a) The Publisher shall print a copyright notice in conformity with the United States Copyright Act and the Universal Copyright Convention in the name of Brains and Genius in each copy of the Work printed by the Publisher are require its licensees to do the same. The Publisher shall register the copyright on the Work with the United States Copyright Office promptly after first publication and may record this Agreement with the United States Copyright Office.

(b) Any textual or illustrative material prepared for the Work by the Publisher at its expense shall be approved by the Proprietor, such approvals not to be unreasonably withheld or delayed and may be copyrighted separately as the Publisher deems appropriate.

(c) All references to copyright in this Agreement shall reflect any amendment made subsequent to the date of this Agreement in the copyright laws of the

United States, in any international copyright convention to which the United States is a signatory or in the copyright laws of any other country within the Territory. Both parties shall execute such documents as may be necessary to effectuate copyright to the Work in accordance with this Agreement.

(d) In the event of any infringement of the copyright to the Work, the Publisher may employ such remedies as it deems advisable and may name the Proprietor a co-plaintiff in any litigation the Publisher may commence. The Publisher shall bear the entire expense of any such litigation. Any recovery shall be applied first to reimburse the Publisher for its expenses; the balance shall be divided between the Proprietor and the Publisher as follows: that portion which is based on actual damages shall be divided in proportion to the losses from such infringement suffered by each, and that portion which is based upon the infringers' profits, statutory damages or punitive damages shall be divided equally.

(e) So that the Publisher may comply with the requirements of the United States Copyright Act, the Proprietor shall promptly provide the Publisher with two copies of any edition of the Work and any publication that contains a portion of the Work published before publication of the Work Under this Agreement and all information requested by the Publisher about such publications. If requested, the Proprietor shall obtain assignments that permit the Work to be copyrighted in the Proprietor's name.

12. OPTION

In further consideration of this Agreement, the Proprietor grants to the Publisher an option on the Proprietor's next book-length autobiographical work by Brian Wilson to which the Proprietor controls the rights, ("the option book"), such option to be exercised as follows. The Proprietor shall submit to the Publisher a reasonably detailed outline for the option book before offering rights to the option book to any other party. The Publisher shall have 15 days from its receipt of the outline to advise the Proprietor whether it wishes to publish the option book and upon what financial terms. If within such 15-day period the Publisher does not advise the Proprietor that it wishes to publish the option book, the Proprietor may offer the option book to other parties without further obligation to the Publisher. If within such 15-day period the Publisher does advise the Proprietor that it wishes to publish the option book but within 15 days of the Publisher so advising the Proprietor, the Proprietor and the Publisher have not agreed on financial terms for such publication, the Proprietor may offer the option book to other publishers without further obligation to the Publisher.

13. PROPRIETOR'S RIGHTS OF TERMINATION

(a) If the Publisher does not publish the Work within the time specified in Paragraph 4. (a) for reasons other than first serial or book club use (for book club use the delay may be no more than three months), delays of the Proprietor in returning the copyedited manuscript or proofs, the Proprietor's failure to comply with requests made by the Publisher's counsel or delays caused by

circumstances beyond the Publisher's control and if the Publisher at any time thereafter receives written notice from the Proprietor demanding publication, the Publisher shall within 90 days of the Publisher's receipt of such written demand either publish the Work or revert to the Proprietor in writing all rights to the Work granted to the Publisher in this Agreement, subject to any outstanding licenses, which shall be assigned to the Proprietor, and the Proprietor shall retain any advance payments made under this Agreement prior to such reversion as liquidated damages for the Publisher's failure to publish the Work. In so far as any portion of the advance payable under Paragraph 5. (c) has not been paid prior to such reversion, such portion shall be paid upon such revision. Notwithstanding the foregoing, the Publisher agrees to obtain the Proprietor's approval of any delay in publication to be caused by any book club usage of the Work.

(b) (1) If the Work is out-of-print and the Publisher receives from the Proprietor a written request for a reversion of rights, the Publisher shall within four months of the Publisher's receipt of such request do one of the following: (i) announce that it will reissue an edition of the Work under one of its imprints within one year from the date of the request; or (ii) enter a license providing for the publication in the United States of an edition of the Work within one year from the date of the license; or (iii) revert in writing to the Proprietor the rights granted to the Publisher in this Agreement. (If the Publisher does announce that it will reissue an edition of the Work but has not reissued an edition one year after the Publisher's receipt of a request for reversion, the

rights shall on such date automatically revert to the Proprietor.)

(2) Any reversion shall be subject to grants of rights made to third parties prior to the date of the reversion and the right of the Proprietor and the Publisher to participate in the proceeds from such grants. Upon reversion, the Publisher shall provide to the Proprietor fully executed copies of any agreements relating to the Work made by the Publisher then in effect.

(3) The Work shall be considered out-of-print if no edition is available for sale through ordinary channels of the book trade in the United States from the order fulfillment department of the Publisher or a licensee of the Publisher and no license is in effect which provides for the distribution of an edition of the Work through ordinary channels of the book trade in the United States within at least 12 months from the date of the Proprietor's request for a reversion.

14. PUBLISHER'S RIGHTS OF TERMINATION

(a) If the Proprietor does not deliver the complete manuscript for the Work within three months of the delivery date in Paragraph 2. (a) or, if requested to do so, does not deliver a revised, complete manuscript for the Work within the time specified in Paragraph 2. (a), the Publisher shall not be required to publish the Work and shall have the right exercisable at the Publisher's discretion at any time thereafter to recover from the Proprietor any advances made to the Proprietor under this Agreement. When such advances are fully repaid, this Agreement shall terminate.

(b) If the complete manuscript as first submitted by the Proprietor is unacceptable and the Proprietor, after receiving the Publisher's request for changes and revisions, in good faith makes a timely delivery of a revised, complete manuscript for the Work prior to notice under Paragraph 14. (a) that satisfies all the provisions of this Agreement except the requirement of being acceptable to the Publisher in content and form, the Publisher shall not be required to publish the Work and the Publisher shall give the Proprietor written notice of its decision not to publish. Thereafter, the Proprietor may enter an agreement for the Work for the portion of the Territory exclusive to the Publisher herein provided the Proprietor pays to the Publisher all monies payable thereunder promptly as and when received until advances made to the Proprietor under this Agreement have been recouped by the Publisher. If within five years from the date of the Publisher's notice that it will not publish the Work the Proprietor has not made arrangements for the publication of the Work by another publisher, the rights to the Work shall automatically revert to the Proprietor and the Proprietor shall have no further obligation to the Publisher with respect to the Work.

15. FORCE MAJEURE

The failure of the Publisher to publish or reissue the Work shall not be a breach of this Agreement or give rise to any right of termination or reversion if such failure is caused by restrictions of governmental agencies, labor disputes, inability to obtain materials necessary for manufacture of the Work or any other reason beyond the Publisher's control; in the event of delay from any such

cause, the publication or reissue shall be postponed for a period of time reasonably related to such cause.

GENERAL PROVISIONS

16. The Proprietor shall keep at least one copy of the manuscript for the Work and any other materials submitted to the Publisher under this Agreement. The Publisher shall upon the Proprietor's written request, made within a year after first publication by the Publisher, return to the Proprietor the copy of the manuscript used for typesetting; the Publisher shall not be required to retain such manuscript for more than one year. The Publisher shall not be responsible for the loss of or damage to any manuscript or other materials submitted by the Proprietor except in the event of its gross negligence.

17. No advertisements shall be included in the Publisher's hardcover edition of the Work and no advertisements (other than advertisements for other publications of the Publisher thereof) shall be included in any other edition of the Work published by the Publisher or under license from the Publisher without the Proprietor's written consent.

18. The Publisher may use the name, likeness and biographical data of Brian Wilson on any editions of the Work published by the Publisher and in any advertising, publicity or promotion for the Work and may extend these rights in connection with grants of the subsidiary rights made by the Publisher.

19. (a) If the Publisher is required by law to withhold and pay to any U.S. or foreign government taxing authority any portion of amounts due the Proprietor under this Agreement, such payments shall be deducted from the amounts due the Proprietor hereunder.

(b) If any foreign taxes, bank charges or agents' commissions are imposed on any payments due the Publisher from the exercise of any right granted in this Agreement, the appropriate allocation of proceeds between the Publisher and the Proprietor from the exercise of such right shall be made on amounts received after such charges have been paid.

20. In the event of the bankruptcy, insolvency or liquidation of the Publisher, this Agreement shall terminate and all rights granted to the Publisher shall revert to the Proprietor automatically and without the necessity of any demand or notification.

21. This Agreement shall be binding upon and inure to the benefit of the successors and assigns of the Proprietor and the successors and assigns of the Publisher and may not be assigned by either without the written consent of the other, with the following exceptions. The Proprietor may assign the Proprietor's right to receive payment under this Agreement upon written notice to the Publisher. The Publisher may upon written notice to the Proprietor assign this Agreement to any company that acquires or succeeds to all or a substantial portion of the assets of the Publisher.

22. If under any provision of this Agreement the Publisher is required to obtain the Proprietor's approval, such approval shall not be unreasonably withheld or

delayed. If the Publisher fails to receive a response from the Proprietor within such time as the Publisher may reasonably designate to accommodate its schedule for publication, promotion or the exercise of rights when any approval is requested, the approval requested shall be deemed granted.

23. This Agreement contains the entire understanding of the Proprietor and the Publisher with reference to the Work; there are no warranties other than those expressly stated in this Agreement. No waiver or modification of any provision of this Agreement shall be valid unless in writing and signed by both parties. No waiver of any breach shall be deemed a waiver of any subsequent breach. If any provision of this Agreement is held to be invalid or unenforceable, the remaining provisions shall not be affected.

24. Regardless of its place of physical execution or performance, the provisions of this Agreement shall in all respects be construed according to, and the rights and liabilities of the parties hereto shall in all respects be governed by the laws of the State of New York.

25. The caption headings of this Agreement are inserted for convenience only and are without substantive effect.

26. This Agreement shall be of no force and effect unless signed by both parties within 60 days of the date first stated above.

27. The Proprietor hereby authorizes the Proprietor's agent, William Morris Agency, Inc., 1350 Avenue of the Americas, New York, New York 10019, to collect and

receive all sums of money that are payable to the Proprietor under the terms of this Agreement and declares that the receipt of the said agent shall be a good and valid discharge in respect thereof, and said agent is hereby empowered to act in the Proprietor's behalf in all matters arising out of this Agreement.

28. As a condition precedent to the signing of this Agreement by the Publisher, the Proprietor shall deliver to the Publisher a copy of the letter attached as Exhibit A signed by Brian Wilson.

IN WITNESS WHEREOF, the parties have signed this Agreement to be effective as of the date first stated above.

BRAINS AND GENIUS

By /s/ Brian Wilson
Brian Wilson

HARPER & ROW, PUBLISHERS, INC.

By /s/ William M. Shinker
William M. Shinker
Senior Vice President & Publisher
Adult Trade division

By /s/ Gladys Justin Carr
Gladys Justin Carr
Vice President
Associate Publisher
Adult Trade division

Agent's Federal Tax Identification Number: _____
Brian Wilson's Citizenship: _____
Brian Wilson's Birth Date: _____
Todd Gold's Citizenship: _____
Todd Gold's Birth Date: _____
(This information is needed for copyright purposes.)

WILSON/J:Trade

(Seal)

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SCHEDULE A

ADEN
AUSTRALIA
BANGLADESH
BELIZE
BOTSWANA
(formerly Bechuanaland)
BRITISH WEST INDIES
comprising:
Bahamas, Bermuda, Barbados,
Guyana, the Caicos, Cayman,
Leeward, Turks, and Windward
Islands
BRUNEI
CAMEROUN
CYPRUS
EIRE (Republic of Ireland)
FALKLAND ISLANDS
GAMBIA
GIBRALTAR
GHANA
HONG KONG
INDIA
JAMAICA

KENYA
KUWAIT
LESOTHO
(formerly Basutoland)
MALAWI
(formerly the Nyasaland Protectorate)
MALAYSIA
(comprising:
the Malayan Union, Sabah and Sarawak
MALTA and GOZO
NAMIBIA
(formerly South West Africa)
NATIVE STATES OF INDIA
NEW ZEALAND
(including Ross)
NIGERIA
PACIFIC ISLANDS
comprising:
British Solomon Islands, Tonga Western Samoa, Fiji, Nauru Islands, New Hebrides, Gilbert and Ellice Islands, Union Islands (New Zealand), Papua New Guinea (Australia), Pitcairn Island
PAKISTAN
REPUBLIC OF SOUTH AFRICA
ST. HELENA
SEYCHELLES
SIERRA LEONE
SINGAPORE

SRI LANKA
SUDAN
SWAZILAND
TANZANIA
(formerly Tanganyika
and Zanzibar)
TRINIDAD and TOBAGO
UGANDA
UNITED KINGDOM
(including Northern
Ireland, the Isle of
Man, and the Channel
Islands)
ZAMBIA
(formerly Northern
Rhodesia
ZIMBABWE
(formerly Rhodesia)

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EXHIBIT A

May 18, 1990

Harper & Row, Publishers, Inc.
10 East 53rd Street
New York, New York 10022

RE: LOVE AND MERCY, by Brian Wilson with Todd Gold

Dear Sir:

I acknowledge that Harper & Row, Publishers, Inc. ("H&R") is entering an agreement dated May 18, 1990 (the "Agreement") with Brains & Genius (the "Partnership") which provides for H&R's publication of a book

entitled LOVE AND MERCY written by me. I understand that H&R will countersign the Agreement only if I agree to the following:

1. I represent to H&R that the Partnership has the right to enter the Agreement and bind me personally to the terms of the Agreement and to provide the services of me required under the terms of the Agreement.

2. I represent to you that I have read the Agreement, understand its terms, and agree to be personally responsible for the performance of the Partnership and to be personally bound by the obligations of the Partnership. Without limiting the generality of the foregoing, I agree to the provisions of Paragraphs 4. (e), 9, 12, and 18.

3. To induce H&R to enter the Agreement with the Partnership, I agree that all obligations of the Partnership will be duly performed by the times and manner described in the Agreement and that I will perform all obligations required of me so that the Partnership will at all times be in full compliance with the terms and conditions of the Agreement. Any notice given to the Partnership shall be sufficient notice to me for my personal guarantee of the performance of the Agreement by the Partnership.

4. I agree that the entering of the Agreement by H&R with the Partnership is sufficient consideration to me for the agreements and representations made by me in this letter.

Sincerely,

/s/ Brian Wilson
Brian Wilson

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BRIAN WILSON: LOVE AND MERCY

A proposal by Brian Wilson

with Todd Gold

Brian Wilson: Love and Mercy

Table of Contents

1. Proposal overview .....1
2. Proposal biography .....10

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Let me acquaint you with my trip. I am a perfectionist, and early on I had a lot of ass-kick in my blood, which turned out to be good and bad.

Brian Wilson

"First Elvis died. Brian Wilson should've been next. He was all set to become the next big rock and roll headline."

Dr. Eugene Landy

Brian Wilson: Love and Mercy

Overview

"Surfer Girl." "I Get Around." "Fun, Fun, Fun." "Help Me, Rhonda." "California Girls." "Good Vibrations." "God Only Knows." "In My Room." "Surfin' U.S.A." "Surfin'." "Be True to Your School."

Songwriters call them classics, and indeed, these three-and-a-half minute jewels are stitched into the fabric of American culture. They romanticize an idylic image of southern California. They celebrate an idealized teenhood of driving, dating, and surfing.

They also reveal the inner fantasies of a happy, uncomplicated childhood never realized by the remarkable author of these tunes – the reclusive leader, creative genius, and most famous member of the Beach Boys, Brian Wilson.

Without question, Wilson is one of music's true legends, living or deceased. His accomplishments have made him one of the all-time greats of the rock era, alongside contemporaries like Lennon and McCartney and Elton John. Since his first hit in 1961, his music has generated Beach Boys album sales in excess of 200 million copies worldwide, among the all-time leaders. McCartney once made a pilgrammage [sic] halfway around the world just to meet the exhaulted [sic] Wilson. In 1986 Wilson, minus his group, gained entry to the Rock Music Awards' Hall of Fame with such allowed icons as Elvis Presley, Bob Dylan, and John Lennon. Ten years later he and his Beach Boys brethren were anointed [sic] to the Rock and Roll Hall of Fame.

But music composes only a portion of the Brian Wilson myth. Not yet five years out of suburban Hawthorne High, he was a certified pop marvel – he literally defined the term "producer" for the record industry – suffering his first crippling breakdown on a plane from Los Angeles to Houston. The next year, 1965, he vowed never to take the stage again. Gripped by drugs and alcohol, he engineered a colorful flipout worthy his superstar stature, spending nearly five years in his bedroom. Prior to that, Wilson sought inspiration by setting his piano in an enormous sandbox he had built in the living room of his Bel Air mansion, which was originally built by Tarzan creator Edgar Rice Burroughs.

By the '70s Wilson was bearded, bloated, and bottomed out. A 300-pound junkie, he was rock's leading candidate for the obituaries until 1983 when he turned himself over to Dr. Eugene Landy, a brilliant if unorthodox psychologist. Landy implemented his 24-hour, $200-a-day therapy despite extremely severe criticism, and eventual ostracism, from the other Beach Boys. Treatment ended in early 1986 with Wilson virtually reincarnated a new healthy and productive man. But the unorthodoxy of the therapy program brought Landy under investigation by the California Attorney General's office for professional misconduct.

Nonetheless, the maverick psychologist had worked the miracle 38 previous shrinks had been unable to perform: Wilson, at 46 years old, was alive and fit, at peace with himself. Drug and alcohol free, he had lost more than 150 pounds, kept a salt-free, vegetarian diet, and learned to care for himself. He is now self-sufficient. Moreso, [sic] Wilson is once again creating music.

How far Wilson had come was evidenced last year when he sauntered back into the spotlight with his first-ever solo album, "Brian Wilson." The unvieling [sic] of 11 new Brian Wilson compositions was cause for celebration. Doubts that this Midaslike maestro had lost his gold record touch were erased by glowing reviews from *Rolling Stone*, the *New York Times*, and the *Los Angeles Times*. The melodies were joyous, the harmonies soared with an old innocence and purity in a newfound confidence. More important, the Brian Wilson who met the press appeared strong, sharp of mind and body, and as ambitious as he was in 1961 when he penned his first hit "Surfin' Safari."

But the release of a solo album didn't mark the end of Brother Brian's therapy as much as it did the beginning of his new life. He didn't want to rest. He didn't run six miles a day and get himself into fighting shape to sit on past accomplishments. He'd been down long enough. It was time, he felt, to tell people, "Here I am. I'm back."

And busy, Wilson has already started work on his second, much-anticipated solo album, due out sometime in mid 1990. He has agreed to work again with the Beach Boys in the proper recording situation. He is being honored in February 1990 by NARAS, the publishing organization, as their Man of the Year, which will initiate the first-ever all-music industry-supported drug-and-substance abuse program. He is scheduling a tour for sometime next year.

Music isn't the only project the superstar has on tap. Brian Wilson has determined the time is finally right for him to set down the story of his celebrated life and career – how he's gone from the top to the bottom and come all the way back – in his proposed book, *Love and Mercy: The Brian Wilson Story.*

"I don't know if I can get any bigger, but in music I'm pretty big already," he says. "I have millions of fans throughout the world. I think they're tired of hearing about me and instead would really like to hear *from* me. They want to know the truth. For the first time ever, I'm able to tell it. More important, I want to tell it."

There's another reason Wilson has decided to undertake a book at this time and it has to do with his growth as an artist. "On the verge of recording my second solo album, I've found myself confronting a serious artistic

question relating to my career as well as my life. I want to address serious topics in my music, like mental illness, sex, drug abuse, topics that show my growth as an artist and maturity as a person.

"It's something I tried to do in my last album. But whatever I attempted was shot down my [sic] record label executives who didn't believe that fit the public's perception of Brian Wilson. So I have to ask myself: am I married to pretty melodies and innocent lyrics? Or can I grow? Can I attempt daring music that accurately reflects what I've been through and the person I've become?

"The answer, I believe, is yes. Yes I can grow, damn whatever the corporate guys say. This is what makes my book so important to me and my music. I want to express myself, to tell people what I've been through, to take people through the harrowing storms of drug-and-alcohol abuse and mental illness, through rock and roll craziness at its most extreme, as well as to the healthy place where I am at today.

"It's a helluva story and – I can't emphasize this enough – I've never been more serious about getting it all down accurately once and for all."

Is there a market for Brian Wilson's life story? Unquestionably. Sales of more than 200 million Beach Boys LPs over three decades attests to Wilson's durable and lasting commercial appeal to several generations. The group remains one of the most profitable and popular international touring attractions in music. In 1990, for the first time ever, a complete set of Beach Boys albums will be available on CD, all remastered by Wilson.

More than a dozen articles on the Beach Boys have appeared in *People* magazine alone, half of them on Brian, including two cover stores. He's been chronicled in *Rolling Stone* throughout to '60s, '70s, and '80s. And his personal life occupied the better part of three best-selling, unauthorized, incorrect and by now extremely outdated, books on the Beach Boys' tragedies and triumphs: Steven Gaines' *Heroes and Villains*, David Leaf's *The Beach Boys*, and John Tobias' *The Beach Boys*. Many questions still remain unanswered.

*Love and Mercy* marks the first time that Wilson – or any other Beach Boy, for that matter – will have authorized a personal history of himself as well as this distinctly American band. It's also the first time that Brian Wilson will throw open the book on his public breakdowns and private demons, his battles against drug and alcohol addiction, his struggles with mental illness, his courageous efforts to come to terms with a childhood in which he was physically and mentally abused, and finally, the controversial manner in which Dr. Landy, in his own ground-breaking fashion, orchestrated the startling, heart-warming, *Rocky* like recovery of the man who was everyone's best bet to be rock and roll's next fatality.

Steven Gaines' book *Heroes and Villains* was the most recent examination of the Beach Boys – and Wilson – yet its research essentially stopped in 1980, excluding several minor adds bringing it up to its 1985 publication. But the book missed all of Wilson's treatment with Dr. Landy. Since then, of course, Wilson's life has undergone dramatic change and improved tremendously, a transformation that has never been accurately covered in an in-depth manner. The complete participation of Dr. Landy,

including his exhaustive personal records and documentation of Brian's therapy, along with Wilson assures Love and Mercy of a thoroughness never before available.

If necessary Wilson's mother, Audree, and his ex-wife, Marilyn, will be available for supporting interviews.

Both Wilson and Dr. Landy are aware of the value of promoting a project like *Love and Mercy,* and they are prepared to participate in a full publicity tour once the book is out. Wilson is even toying with the idea, if details can be worked out, of composing new songs for an EP that could be used to develop a special, higher-priced collectors edition of his book.

Given Wilson's accomplished, colorful, and turbulent life, *Love and Mercy* if a multi-layered tale of arresting themes:

* How a blue collar American family realized the American Dream and the steep price they paid for having their ship come in.
* How Wilson was abused as a child by his alcoholic mother and violent father, who was himself an abused child, and the ramifications of that abuse on Wilson's personal and professional life as well as his own family and children.
* The Wilsons as a disfunctional family that continued to play out their disfunctional roles over and over again into adulthood, eventually resulting in Wilson's mental illness, drug and alcohol problems, and the death of of [sic] his youngest brother Dennis.
* The mystery of the creative process, and how Brian's musical genius engineered the rise of

a local surf band into one of rock and roll's most enduring groups.

* The burden of genius; the terrifying realization that you, a mere mortal, possess God's voice and the almost religious function that calls forth; how that genius flowing through a single, innocent young man twists his life, and everyone else's as it is corrupted by others whose only sympathy toward talent is its ability to make money.

* A cautionary tale of drug and alcohol abuse, given Wilson's unbridled use of marijuana, LSD, heroin, uppers and downers, and booze and the havoc it wrecked on his body and mind, family, marriage and career.

* The Brian and Gene story: How a maverick, no-holds-barred healer who had conquered numerous obstacles in his own personal life was brought into contact with a rock superstar on the verge of death and the extraordinary role he assumed in engineering an absolutely amazing rehabilitation and recovery by applying controversial methods that brought Wilson back to making music.

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[Copy Of Book Jacket]

# BRIAN WILSON

## WOULDN'T IT BE NICE
*My Own Story*

WITH TODD GOLD

USA $20.00
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This is one of the most searingly candid memoirs ever published – the autobiography of the founder and creative genius of the Beach Boys. Forget what you may have heard about Brian Wilson and the Beach Boys – this is the real thing.

Brian Wilson turned a suburban California garage band into the Beach Boys, who took the world by storm with the uniquely American sound of his songs, including such classics as "Good Vibrations," "California Girls," and "God Only Knows." Brian, Dennis, Carl, Mike, and Al were the boys next door who personified the laid-back, sunny southern California life style. They were the most popular rock group in the world.

But the cheerful image belied what was really going on, and Brian Wilson is in a unique position to tell the whole amazing story as it's never been told before. For the first time, in his long-awaited, no-holds-barred autobiography, Wilson describes his twenty-year nightmare of drug addiction, alcoholism, obesity, and mental illness. He spent three years alone in his room. He lost his family. He lost his music. And he nearly lost his life.

Only Brian Wilson can tell the truth behind the rumors and myths about his complex, fascinating life, and *Wouldn't It Be Nice* is filled with shocking revelations about his abuse as a child by

(continued on back flap)

(continued from front flap)

his violent father; the bitter infighting among Brian and the Beach Boys, which continues to this day; the death of his beloved brother and drug partner Dennis, who was for a while involved with the infamous Manson family; his love life, which has been unusual, to say the least; the controversies surrounding Dr. Eugene Landy, the therapist he credits with literally saving his life; and how it feels to be the father of two of the stars of Wilson Phillips.

*Wouldn't It be Nice* will make you laugh; it will also make you cry. Above all, you will be moved by the heartbreaking yet inspiring story of one of the greatest musical geniuses of our time. *Wouldn't It Be Nice* is the ultimate rock and roll book.

Rock and Roll Hall of Famer BRIAN WILSON'S first solo album, *Brian Wilson,* was released in 1988 to extraordinary acclaim. He lives in Malibu and will soon release his second solo album. TODD GOLD writes for *People* magazine and is the coauthor of *Little Girl Lost: The Drew Barrymore Story* and Louie Anderson's *Dear Dad: Letters from an Adult Child.* He lives in Los Angeles.

Jacket design by Suzanne Noli
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HarperCollins*Publishers*

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# WOULDN'T IT BE NICE

*My Own Story*

# People weekly

10880 WILSHIRE BOULEVARD,
LOS ANGELES CA 90024
(213) 824-7200

TO: Tom Miller

DATE: _____

# OF PAGES (INCLUDING COVER SHEET) _____

SENDER: Todd Gold PHONE: _____

Miller to Wilson/Landy/Gold

45: Wasn't Lawrence Welk Polish?

p. 50: as mentioned above, put earlier that Mom was an alcoholic. What did she drink? "After dinner drinks" are mentioned on this page – scotch? vodka? gin? all of the above? And this reference to masturbating we need to see a bit more of the start of Brian's sex drive and desires here.

59: Four freshmen was the very first concert Brian ever attended? Ever?

62: See above about need to talk more about girls/dating/sex drive. And perhaps a bit more about what high school was like. Was Brian popular? A good student? What were his favorite subjects?

63: Murry is more negative here than he's been previously. Did this develop gradually or was Murray always this negative?

66: Why was there no fight in Brian (first para)?

70: Suggest starting new chapter here with Mike Love introduction. How did Brian feel about Mike in these early years? We need some sense of this because of the problems later on.

74: Too abrupt transition here. How about showing applying to school, getting in, etc. And make it clearer that Brian still lives at home?

76: We don't really have impression before this that *fear* is such a problem for Brian. Make clearer earlier on?

83: fifth para: Showing Murry is not only reason Brian became songwriter. Make a little clearer that the creation was its own joy as well?

89, last line: "our girlfriends" – we haven't seen or met them. Let's do, please.

87: You could start new chapter here.

95: Show Brian's meeting Judy Bowles before this. What is Mike up to these days?

100: Wasn't Gary introduced earlier in ms? If he's appeared before, the introduction should come before this, or else reference to him earlier should be cut.

101: If Brian and Gary fell in love, more should be made of it. Otherwise this becomes a throwaway line.

106: Mentioning Al's later reaction to his resignation is a bit jarring here. Put elsewhere or cut?

108: Didn't Murry want to get into the production act? What was he up to around now?

112: Why did disputes with dad lead to formation of Sea of Tunes: Mention contractual terms here to set up for later? Last two lines: first we've seen of Mike and Dennis' womanizing. Use more of as theme throughout and expand?

114: How many rooms did the apartment have?

115: Expand more on Brian's emotions about first extended read tour?

119: How did Brian feel about Mike hitting Murry?

124: Make more of Brian's bass playing in ms.

125: Reader surprised Brian still going out with Judy Bowles – we haven't seen her in a while.

128: What is a "ladylike, old-world style"? Isn't it a little odd, for Brian to sleep in same room with Marilyn and Barbara? Expand more on strangeness of it all? Also, perfect opportunity to expand more on disc. of emotions/attractions to all three sisters, which comes as a huge surprise later on. Saying it was a "hormonal merry-go-round" on 129 isn't quite enough.

135: Again, didn't Murry try to horn in on production of album?

139: Expand discussion of Brian's perfectionism. Mention earlier, too? and more about redemption?

141: "my jealous dad . . . give them all our money?" should go after Brian makes record with Jan and Dean. Put on bottom p. 142.

143: Suggest start new chapter with treadmill image. This is the first we see of Brian's emotional turmoil as an adult. Are we to think that this is the start of Brian's madness, or is this still fatigue and stress? Clarify.

145: first we see of Brian's drinking. Put earlier, and perhaps expand discussion here?

147: Expand Brian's emotions/feelings about traveling to Australia.

148: *English* leather?

154: Judy Bowles is still in picture, even though Brian living with Marilyn? Expand more on this and the breakup?

156: Expand on conflicts with Mike here and rivalry?

159: Dennis and Carl have been pretty absent . . .

161: Suggest chapter break here. Why is Brian meeting Phil Spector? Did Spector want to produce him or what? Needs clarification.

167: The breakdown's arrival is a bit of a surprise . . . hearing voices, etc. Could we be a little better prepared for it by earlier mentions and hints?

168: How did the Ed Sullivan show go and how did Brian feel about it? Last line: I thought Mike was already chasing women, even though married?

170: See earlier reference to abruptness of breakdown. This crying jag also comes as a bit of a surprise. Prepare reader for this a bit better?

172: Where was apartment? Describe more?

173: 15½ is pretty young. More about implications of having sex with such a young girl? And when did the sex actually begin?

174: She really threatened to fuck around – at age 15? Pretty precocious!

176: Mention before that Brian's parents have separated. What led to this?

178: Never mentioned before that Brian loved Barbara, who last appeared on p. 129. Show her more in intervening pages? Such things should not come as a surprise to reader, who should be in on Brian's thought processes.

179: Put this come-on to Barbara earlier, before this section of ms.

194: Brian gets over breakdown awfully quickly. Develop more? Is this the first time Brian has ever seen a

shrink? *Was* Marilyn falling in love with Mike or is this a delusion? Clarify, please.

196: What is the year? We could use a few more milestones in these early pages.

198: Show us Brian's deciding process not to tour rather than tell reader in dialogue?

201: News to me that Brian thinks of himself as physical and athletic. Mention more earlier?

210: Brian says he saw God during trip, but he doesn't say that during trip. Clarify? Expand more on description of LSD trip, perhaps?

212: Glenn Campbell has not been enough of a presence heretofore.

213: Summer Days album is out on this page, but is not actually released until p. 216. Move reference on p. 213 to page 216, please.

214: Transition a bit awkward from first para to second. "Periodic if not pained contact"?

216: What was number one? A Beatles album? First we've seen that Brian wrote songs for affection. Who filed paternity suit against Mike? More detail?

222: Hal Blaine comes out of blue.

225: "Genius" would be a good chapter title, yes?

226: What does "coming onto something" mean? Brian's breakdown was coming back? Clarify?

227: Explain koans for uninitiated? What is a "pseudo-ceremonial listen"?

228: Show us before now that Marilyn started smoking pot. Last we saw she was violently against it. She even started going to Loren's?

230: What was the astrologer's name? What is Br.'s sun sign, rising sign, moon sign, etc., for those who care about these things?

235: Casual mention of religion here a little offhand? Incorporate more into rest of narrative and expand?

237: Comes as surprise that Brian watches Flipper and cries at sad parts. Mention and show earlier and throughout? It's endearing.

238: First we've seen that Brian is falling in love with Diane. Mention before and show more of Brian's conflicted feelings. And what about Barbara?

239: Who did Brian describe 'I Just Wasn't' for?

240: Brian still has a relationship with his father? Expand?

242: This is first Brian has criticized himself for treatment of other Beach Boys. More throughout for balance?

243: These quotes from Murry are starting to seem a bit repetitive? Alter for variety?

247: Discovering Brian at meeting with taped responses seems out of blue. Show Brian deciding to do this?

248: Who did McCartney call God Only Knows one of the best songs to? Any other Beatles anecdotes from Derek Taylor?

249: "no one believed me" – what does this mean, exactly?

250: Transition here is very abrupt. How about "stars Within Reach" or some such for chapter title? I would suggest starting with fourth paragraph and putting Al Jardine opening on next page, when it occurs chronologically.

251: Put spiritual endeavors discussion earlier, when discussing work on Pet Sounds?

252: chronology is – confusing here with Good Vibrations mention. Put after Stones session, please.

254: Brian says it's greatest rock and roll song. Real feelings?

257: Brian says "huh" to Carl. What was he thinking and feeling?

258: Increasing drug use – what drugs? Show more? "When the guys returned from Japan and forced me to defend the music" – show this scene when it occurs chronologically. It's not effective as an aside.

259: Show meeting David Anderle?

We are introduced to David and Danny Hutton on pages 256 and 260. Consolidate?

Other Beach Boys' reactions to Good Vibrations mentioned on pages 257 and 260. Consolidate, please.

261: Mention other beach boys' drug use?

263: "I was all but deified" – a bit too exaggerated? Where did these interviews take place?

264: Start new chapter with Terry Melcher intro? Van Dyke Parks introduced on pages 256 and again now. Consolidate.

266: How did Brian go about choosing lyric writers? Tony was last, now Van Dyke? Was Tony pissed about not being used any more? 40 white mice?

267: How did Van Dyke respond to the gift of the Volvo?

269: First mention of Marilyn's doing coke – show before this with a scene or anecdote? And we haven't seen Brian doing coke yet – not until much later. What is chronology here?

270: Expand on developing paranoia.

274: Good Vibrations came out a while ago?

276: Mark Volman not mentioned before.

278: The boys are back in England? "the Beach Boys were growing up." It doesn't sound like it from their behavior! "I wanted rolling status symbol" – meaning?

279: How overweight was Brian at this point?

280: Beach Boys voted top group in world by whom in England?

281: Transition to Van Dyke a bit abrupt.

282: We haven't seen that Brian has actually slept with Diane before. Prepare reader?

283: Show us Brian trying to sleep with internal screams at night.

284: Chapter break here?

295: Put Elvis anecdote (which I love) earlier, when it occurs chronological rather than as a bookend to Paul McCartney anecdote?

297: What *were* Brian's feelings about Elvis?

298: More details about McCartney's meeting and later friendship? Also, permission needed for Beatles lyric.

299: Chapter break here?

301: Marilyn's plans for future – doesn't she know Brian is not well?

302: It's September. 303: It's July. Please clear up chronology.

304: When did Sergeant Pepper come out? July? First para, last sentence a bit confusing. Meaning? Is Genevelyn the same astrologer as before? Heroes and Villains released on page 304 – already released on page 302. Consolidate?

306, second para from bottom last line – meaning? Put album release at end of this chapter instead of earlier?

308: Reader introduced once again to Danny Hutton (already done on 256) Show meetings with Danny and David when they happen, not now? Good Vibration has been out for ages?

310: Didn't know Diane was Brian's secretary.

311: Smiley Smile released once again? Too many times!

314: Include quotes from Wenner's piece? Hard to judge it otherwise. Put characterizations of Dennis, Al, Carl and Mike earlier on? Again, Dennis keeps coming out of blue; he should be more of a presence.

316: "What Marilyn wanted me to feel . . . " – expand? Mention what Murry said in interview at this point, not in later phone conversation?

317: Didn't know before Carl smoked pot – mention earlier? And why is it such a surprise that Brian smoked – M. saw it before. Second paragraph is confusing – Murry rescinded the sentence, but Brian calls him?

320: Dennis called the previous page.

321: Brian seems to have mixed feelings about meditation. Clarify?

324: More of Brian's emotions on birth of Carnie?

327: Is it Rob Watson or Ron Wilson? It's alternated quite remarkably!

328: Mention schizophrenia?

330: See earlier reference (269) to Marilyn's trying coke.

333: Chapter break here after Manson's name? And how about calling chapter "The Wizard"?

337: Another chapter break seems logical, despite shortness of previous chapter, which doesn't matter, really. Elaborate on end of relationship with Capitol Records.

341: Brian was 250 pounds before, now 200 plus?

346: Suggest another chapter break here.

349: Mention of Mike's excessive meditation is repetition from before.

353: A new chapter break seems called for her. Mention of depression is new. Prepare earlier?

355: He wrote song a few weeks earlier? Put earlier in ms.?

356: Beach Boys a monster could not control repeats earlier reference?

357: First mention of girls in a long while.

359: Again, domestic drama before Holland trip should be put when it occurs chronologically.

361, second para: a bit weakly written. Tighten? I don't remember seeing Wendy's birth. Did reader see that event?

364: First we've seen of Murry in a while – since he sold Sea of Tunes. Why would Brian go over? Expand on love/hate?

366: Why doesn't Brian believe in funerals? Did reader see when Diane and Marilyn were trying to be pop stars? Maybe I missed it but this semes [sic] out of blue. Quote in last paragraph seems a little lame – expand on feelings about father's death?

367: next three years – mention years. Mental illness/allergy metaphor a little strained, it seems to me.

368: Weight reference (see earlier mention). "some kind of mental illness" – state specifically that it's schizophrenia (see 370)?

371, third para: awkward

374: is affair with Diane still going on? Marilyn still sleeps with BRian [sic] but without sex? Clarify? How long has Brian not been washing?

375: Mention Landy's music business background here?

379: obviously Carl and Mike, etc. not seeing Landy – make clearer?

386: "a haif step away from asking for help" – but Brian *did* ask for help above?

388: Chapter break? And which medications were prescribed?

389: What is a "token economy"?

390: first mention of Marilyn's regret of therapy? Expand?

394: When was all this happening? Expand more on cowriting process. We didn't know Landy had been in music business (mentioned later).

397: Chapter break after "war with the Beach Boys"?

398: How long has it been that Brian has not produced?

402: Steve now a convicted felon – when?

421: Mike had resisted Brian's songs, now he presses them through – expand more on Beach Boys' creative bankruptcy?

424: Who did Rocky admit he settled for Marilyn to? Is this a little nasty, perhaps? Didn't Brian have stronger feelings about the Rocky-Marilyn affair? And he doesn't discover them in bed until 440 – consolidate.

427: "Steve, being homosexual, was only mean financially" – What does this mean? I know plenty of gays who are mean in every way, including physically!

428: Has Brian been playing in Beach Boys concerts all along?

429: Is Brian still taking medication? If so, what kind?

430: Carl into heroin? This seems like a real surprise. Mention earlier?

432: Was Brian trying to commit suicide? First we've seen of suicidal impulse. Expand?

436: First rest since Beach Boys started – how about the 3 years in bed?

437: When had Landy predicted an end of the marriage? First we've seen. Last line – it's September; on next page it's January. Confusing.

439: Isn't Bruce already in Beach Boys? And is Brian now fucking Barbara?

440: Who is Debbie Kiel? See earlier reference to consolidating references to Marilyn-Rocky affair. It should come here, I think.

446: Why were Rocky and Stan fired?

448: Cut anti-Semitic reference? It doesn't really add anything.

449: Who is Sherrie Champion? Carl and Marilyn lovers? That comes out of the blue.

451: Introduce Carolyn while Brian still at hospital. What were the prescribed medications?

454: I thought Stan and Rocky had been fired?

456: Reference to squalor of house repeated from first chapter.

457: I think Carolyn's dialogue should be put in regular American dialect. It seems a little racist to me this way.

460: Chapter break with "This is Brian Wilson"?

467: How did Brian feel about his mother's ignoring him?

470: "I didn't know it, but at the time Marilyn and Carl . . . " this is mentioned on page 449. Consolidate, please.

471: What month is this? Is this 1983?

478: "He's in danger of not surviving . . . " Why? What exactly is wrong? More medical details?

479, second sentence – meaning? Chapter break before "I didn't know the details . . . "? How about calling this chapter "This is Hawaii"? I love this chapter, by the way. Was this excursion to Hawaii checked with the Beach Boys or did it not matter? Clarify?

482: First we've seen of Brian rolling eyeballs.

489: No chapter break needed here; would suggest space break instead.

492: Again, what drugs were prescribed?

495: Had Brian been bathed in the hospital? And had he been in pool in LA? Put fear of shower before this?

505: Suggest chapter break.

507: Is this 1983?

512: Describe press conference in more detail?

514: Date of return to LA?

520: Where did the two years go (it was 1983, now 1985)?

522: First we've seen that Marilyn and girls detest Landy.

524: Did Brian ever tell his girls about Murry's abuse?

525: There's a gap here – a good place to put in more about the development of the songwriting collaboration process between Brian and Landy.

527: How much does Brian pay Marilyn in alimony? In fact, finances could be mentioned more throughout ms.

530: Put Landy's RCA experience earlier in ms. What exactly did he do for RCA?

537ff: Trim Gary stuff; it's a bit of a sidelight.

542ff: Trim Titleman stuff – it goes on a bit too long and is frankly not that compelling.

551: "I was actually having fun recording . . . " It didn't sound like Brian was having fun!

555: Was there applause after Brian's speech?

557: Trim some of the Lenny stuff?

563: Again, trim some of the Titleman material?

572: Include excerpts of album reviews? When did Brian start to keep a journal again?

574: Again, time problem – put exclusion from Kokomo recording session earlier, when it happened. How does Brian feel about Kokomo as a song?

576: Time problems: "early 1985 . . . one day in 1976 . . . jump ahead ten years"!

577: Trim Terry stuff? And show us relationship with Pam Thomas?

581: Christ never mentioned before?

582: Summarize this dialogue, which doesn't strike me as necessary?

584: This section seems a teensy bit self-serving – tone down somewhat?

590: First we've seen Landy discovered George Benson.

592: News of book is a surprise – mention more of evolution and development

594: Cut shit falling reference?

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# People weekly

10880 WILSHIRE BOULEVARD,
LOS ANGELES CA 90024
(213) 824-7200

TO: Tom Miller

DATE: _____

# OF PAGES (INCLUDING COVER SHEET) _____

SENDER: Todd Gold PHONE: _____

Here are important changes. Small but important.

represented my dad in the sale, failed to disclose that he was also legal counsel to Irving Almo and that he also sat on the board of directors of A&M Records. There was an obvious conflict of interest.

In addition, there were no receipts or documents showing that I received payment of any kind [original text deleted and following information handwritten – for] either the sale or transfer of copyrights to Irving Almo. Nor could I remember receiving any. Also, it was obvious from studying the various papers, including the 1969 letter of transfer, that my signature was forged. [original text deleted and following information handwritten – Since my dad & I were co-]owners of [text illegible] consent. [original text deleted]

[original text deleted and following information handwritten – A] month before the suit was filed, Irving Almo suddenly produced copies of the songwriter's agreements they had previously said [original text deleted and following information handwritten – didn't exist.] As [original text deleted and following information handwritten – Dr. Landy and] I studied them [original text deleted] my head spun. According to the 1969 letter that bore [original text deleted] my dad's [following information handwritten –and my] signatures, these agreements had all been executed "in accordance with normal practice." Clearly, though, that wasn't the case.

Let's sort through some of the facts," said Landy, who ticked them off on his fingers. "Your signature on the letter was forged. Right?"

"Correct, [original text deleted]" I said.

"Your signature on many of the songwriting agreements was also forged," he said. "Is that true?"

---

"Think about [original text deleted and following information handwritten – how nice it would be to get your songs back] if we win this [original text deleted and following information handwritten – case]," he grinned.

I did, and it was a [original text deleted and following information handwritten – nice] thought.

[original text deleted]

* * *

The first time I walked into my new studio I felt a strange [following information handwritten – sense of] deja vu. It was late February, 1990, and renovations on the building I'd bought weren't completed yet. But the 48-track recording studio Gene and I had designed and had built to work on my new album was finished. I found myself giddy with excitement. For the first time since the Beach Boys owned Brother Studios in the mid 1970s, I had a studio where I could go and work at any hour of the day.

It was close to noon, and workmen were trudging through the rooms with equipment. I went immediately into the little soundproof room where I'd put both the grand and an upright Young Chang pianos and closed the door. The light was off, which made it darker than night and quieter than a deserted island. I started to play; the room overflowed with music. It was dense with sound.

The chord changes lingered above me, hanging close to the ceiling like billowy clouds.

I'd worried about spending the money to buy the building, but it suddenly became clear that I hadn't made just a good investment. I now had a place where I could go and, like the song I had written nearly 30 years earlier said, "tell my secrets."

---

[original text deleted]

The most interesting part of the process was that it forced me to play detective and investigate my own life, an odd experience in which I tried to reconstruct all the bleak, painful events I'd blacked out from memory. The attorney referred to everything as "the facts," but reading over the legal briefs, a text as dry as desert sand, it was impossible to be dispassionate. The facts offered as evidence composed my life, nothing less than my flesh and blood.

In 1961 I'd formed the Beach Boys and written the hit song *Surfin'*. In 1962, I'd put my name on my first professional recording contract with Capitol Records. That same year my dad set up Sea of Tunes Publishing Company, which made us 50 percent partners in the publishing company but stipulated that I would own 100 percent of the copyrights. In 1969, my dad sold Sea of Tunes, then a corporation, for $700,000. By then, [original text deleted] I was incapacitated, mentally ill, a [original text deleted] casualty of drug abuse.

"This is tough stuff," my attorney said after one eight-hour day of questioning in his office. "How're you holding up?"

"You know when I was little, my dad took out his glass eye and made me look into his empty socket," I said. "It was disgusting, red and scarred. It fucked me up for the rest of my life, you know?"

He nodded.

"Compared to that shit, this isn't so bad," I mused.

---

everything live. Everyone sang and played together. In [text illegible] every single note [original text deleted] we sang and played was programmed digitized and run through a computer. When we heard it played back, it was perfect. The sour notes had been made sweet, the off-beat notes had been pushed back into line. Every sound had been blended into seamless perfection.

"Digital recording?" I said.

"That's right," Levine nodded. "Blows your mind, doesn't it?"

The technology was impressive [following information handwritten – –] awesome, in fact. I'd always strived for clarity of sound. "Pet Sounds" had been my breakthrough and I'd spent all my energy afterward trying to top it. But while working with Levine on "The Beach Boys" I learned the lesson that so many people who made albums in [original text deleted and following information handwritten – the] [text illegible] missed: [original

text deleted and following information handwritten – N]o matter how perfect technology made the sound, [text illegible] album still boiled down to great songwriting and a spiritual investment in the music.

The Beach Boys never got the combination right while working with Levine. I collaborated on five songs, several of which were written with Dr. Landy. Not surprisingly, it was those songs – *Crack at Your Love, I'm So Lonely* and *Male Ego* – that the [text illegible] particularly Mike and Al, took exception [following information handwritten – to]. While record[text illegible] demanded to [following information handwritten – re-]write [original text deleted and following information handwritten – the lyrics] on the spot. [original text deleted and following information handwritten – Neither could, but they were given writing credit anyway.]

---

"Wait a minute," I ordered. "Wait. Stop."

Carl and Al [original text deleted] continued strumming their guitars, but stared at me with faces that asked, Is he still crazy? Mike's eyes [original text deleted] told me [original text deleted] he wanted to wring my neck. There was no time to explain that I'd suddenly been struck by inspiration. In the din of the applause that greeted me, I'd heard the song differently and decided to act on it. I turned to the audience.

"I'm going to re-arrange this song right here," I said. "For you."

The guys didn't know what hit them. [original text deleted and following information handwritten – T]hey [following information handwritten – must have] wondered why they even let me onstage. They probably thought, Heck, even without drugs he's still weird. I noticed Mike fuming, glaring at me with undisguised [original text deleted and following information handwritten – anger.] I was stealing his spotlight. Too bad. [original text deleted] I gave Carl a new harmony to sing and asked Al to pay a different rhythm. I told the audience that this was how we did it in the studio. I figured it out and taught it to the boys.

"You'll like the song better this way," I said, then turned to the band and counted them down. "One, two, three, four."

The new arrangement sounded great and the audience went out of their heads. My first concert was a success for everybody, particularly me.

"What had [sic] did you pull that out of?" Carl asked between songs, "That was really from left field."

"Surprised you, huh?" I laughed.

"I wish you [original text deleted and following information handwritten – 'd] told us at rehearsal," he scolded.

---

"What's wrong?" Dr. Landy asked.

"I can't do it," I said. "I can't go on stage. I'm too frightened."

"Okay, we're going to help you relax," said Dr. Landy.

Dr. Landy put his hands in mine and told me to squeeze with both hands [original text deleted] As hard as I could, I began to clamp down. Then I realized that I was much bigger than Dr. Landy. If I squeezed with all my might, I thought, I'd hurt him. I stopped.

"Why'd you stop?" asked Dr. Landy.

"I don't want to hurt you," I said.

"How do you feel?" he asked. "Stronger? Like playing a show?"

"Yes," I said, and indeed, the act of starting to squeeze, then stopping and thinking about hurting Dr. Landy cleared my mind of stage fright.

In fact, it distracted me enough that I absorbed the energy from the large audience and felt energized myself.

Calm and centered, I walked onstage as if it belonged to me and the Beach Boys played with me every day. The guys had just started *I Get Around,* but the music was quickly drowned out by the ovation I got when the crowd recognized me. Mike [original text deleted and following information handwritten – gave] me a brief [original text deleted] introduction – more like a [original text deleted] nod – but then he kept on singing.

I grabbed a microphone and moved to the front. The guys looked shocked to see me singing and swaying, but

not as shocked as they were when I asked them to stop playing.

---

[original text deleted and following information handwritten – I was starting to. I really was.]

---

We worked one hour in the morning and one in the afternoon, taking each song until I mastered the music and the lyrics again. But the playing never extended beyond the prescribed hour, no matter if I hungered to continue [original text deleted and following information handwritten – . E]ach song dredged up [original text deleted] memories and experiences, most of them unpleasant, and Dr. Landy wanted me to deal with them. I'd spent years ignoring these emotions, drowning them in booze, drugs, and food. There was none of that anymore. Instead, we talked.

"Why do you think Mike Love's going to beat you up?" Dr. Landy asked.

"Because he hates that his name isn't on *California Girls.*"

"Why isn't it?"

"I don't know."

"Well, who wrote the credits down?" he asked.

"My dad."

"Did he ask if Mike had written any of the song?"

[original text deleted and following information handwritten – "No."

"Did Mike ever tell him that he wrote some part of the song?"

"No."]

"Okay. [original text deleted] You [original text deleted] So what's the problem?"

"He's mad at me," I said.

"That's Mike's problem," Landy said, "Not yours. [original text deleted] If he's convinced himself [original text deleted] he wrote it that's his problem. Not yours. He'll have to get his own shrink and work [original text deleted and following information handwritten – his own problem out, as you are.] Do you understand?"

---

where I'd have to learn to live within my means. He said that would force me to function.

The philosophy Dr. Landy outlined was simple. Each person has room in [original text deleted and following information handwritten – his] head for just one crazy person. Normal thinking is easily manipulated by craziness. If Dr. Landy acted crazier than me, then I had to either get sane or get crazier than Dr. Landy. It was no contest, Dr. Landy assured them. He guaranteed that he could be crazier than me because he was saner than him.

[original text deleted]

"You can't possibly get Brian to do something until he has to," Dr. Landy explained. "That's the point. Making him have to do things. I'll get him to choose different behavior because, figuratively speaking, he'll be traveling down a familiar street and suddenly it will have been closed off. He'll be forced to find a new route. He'll be forced out of his craziness and into [the following information handwritten – dealing with] reality."

Then Dr. Landy explained what was going to happen. He was going to remove me from the easiness of my reclusive homelife, eliminating the self-destructive avenues I'd set up for myself. My money would be cut off. The Beach Boys would fire me. I wouldn't be able to afford drugs. I wouldn't be able to afford an escape. Cut off, I'd be placed in a healthy [original text deleted] new environment.

---

made breakfast while he dressed. Suddenly she heard him call for help from the bathroom. He collapsed in her arms and never regained consciousness.

"You have to get dressed now," said Marilyn. "We have to get to your mom's house."

I didn't go to the funeral. [original text deleted and following information handwritten – Funerals] aren't something I've ever believed in. By then, it's over. Why be reminded of the inevitable? To this day I've never been

to a funeral and I don't plan on breaking that. [original text deleted]

Instead, I took Diane and flew to New York, getting as far away from the funeral as possible. In New York, Diane [original text deleted and following information handwritten – was there to] promote [original text deleted] *Shyin' Away,* the single from an album she and Marilyn made [original text deleted and following information handwritten – as] a revival of their long-stalled singing career, though they called themselves American Spring instead of the Honeys. I'd helped out in four tracks. In the interviews I gave, I didn't talk about music as much as I did the effect [original text deleted] my dad's death had on me.

"You know, since my father died, it's been a lot different," I said to a reporter from Record World magazine. "You know, I feel a lot more ambitious. It really does something to you when your father passes away. Takes a while to get over it, too. I got a new perspective on life."

[following information handwritten – It all seemed unreal. Dad was dead. How weird.]

---

slick, smooth surface brush against my cheek. I got sick. My knees weakened and I crumbled to the ground. Tears were gushing down my face; I was crying outloud. Angry, confused, weak, dazed, frustrated, I pounded my fists on the ground and kicked, screamed and cried like a little child.

"Why is he doing this to me?" I cried. "Why, why, why."

* * *

The next day I told Grillo to talk to the Beach Boys's attorney, Abe Somer [original text deleted and following information handwritten – . W]hat I didn't know about Somer was not only did he sit on A&M's Board of Directors, but he [original text deleted] also [original text deleted and following information handwritten – later got] a considerable [original text deleted and following information handwritten – amount] of company stock. [original text deleted] In addition, he also talked my dad out of selling Sea of Tunes to another company, Filmways, for $50,000 more and a return of 50 percent ownership after the cost had been made up.

"Listen Brian," Grillo reported back, "I talked to Abe. He said there's nothing you can do to stop it. The deal's as good as done. Sorry."

In the days that followed there was no question in my mind: I was beaten. Despondent, I muddled through the daytimes, struggling to drag my body out of bed, but losing the struggle more often than not. At night, I dodged the voices that threatened me from behind and above and inside. *You're burned. Can't hide from the devil. Death is around the corner. Spector's pissed. No hiding from it, Brian. You're going to be killed. A bad death, bad death, bad death . . .*

protect me, as a cushion for any crisis, a reminder of who I was, perhaps a source of inspiration for what I might still become. In any event, those songs were my children and I treasured that I owned them.

Most of the time I was out of it, emotionally disturbed and intent on avoiding everyone and everything. In fact, I've recently [original text deleted and following information handwritten – been reminded] through other people's testimony about the call I answered from the Beach Boys's business manager Nick Grillo in November [following information handwritten – 1969.] I was surprised to hear from him. There was no business to take care of. After asking how I was feeling, Grillo inquired if I'd been writing any songs. No. I'd been too scattered, too blue.

"Life's got me really down," I said.

"Brian, I've got some news to tell you," said Nick.

"What?" I asked.

"Listen carefully to what I'm going to say," he said. "It's complicated. But in a nutshell: Your dad [original text deleted and following information handwritten – is going to sell] Sea of Tunes. That means," –

"He what?" I exclaimed.

"He [original text deleted and following information handwritten – is going to sell] Sea of Tunes. He [original text deleted and following information handwritten – is going to sell] your songs."

Grillo then explained that my dad was going to sell Sea of Tunes Publishing Company to Irving Almo Music,

the publishing arm of A&M Records. Although my dad collected the publishing royalties, I was still under the impression that I owned the company. I'd never given in to his demands and lies. Hysterical, I yelled at Grillo that my dad had no right. There

---

that helped control the manic feelings and hallucinations I couldn't handle on my own. I knew I was losing all the progress I'd made in the past year and there wasn't a damn thing I could do about it.

At the same time, the Beach Boys [original text deleted and following information handwritten – were] ecstatic. Free of the Warner Brothers contract, Steve Love quickly finalized a multimillion dollar, multi-album deal he had been negotiating for several months. I had no idea, but the deal stipulated that I write and produce 80 percent of the material. That was preposterous. I wasn't in [following information handwritten – any] shape to take on that job. My head wasn't up to it – Nor was my heart.

If I'd understood the contract, I would've objected. [original text deleted] I don't remember reading it. Nor do I [original text deleted] remember signing it. [original text deleted]

I was the soul of the group. But with me no longer able to deliver, the Beach Boys had turned into an entertainment corporation interested only in money, a far cry from a band that once put out important, spiritual music. The realization made me cry.

I didn't even know my bandmates anymore. Were they family, friends or foes? [following information handwritten – Heroes or villains?] At the time of the signing, Mike was in Switzerland, studying how to levitate under the guidance of the Maharishi. Al was at his Big Sur Ranch. Dennis, divorced and [following information handwritten – heavily] into drugs, was working on his solo album, "Pacific Ocean Blue." Carl, in the process of getting divorced, was trying to get unhooked from cocaine and considering doing his own solo album.

---

[text illegible] a chance? "Chuck asked: [text illegible] *Help Me Rhonda* get away. Now *California Girls.*"

"I didn't think Western was big enough to hold all the guys I wanted," I said, referring to the large number of musicians, I was starting to employ.

"Shit," Brtiz said. "The next time you do a big orchestral production, I want you to do it here."

[original text deleted]

[original text deleted] I've never liked the way I sound on that record and would've redone the song had there been time. But there wasn't. Summer was approaching, and there hadn't been a summer for the past three years that didn't include a new Beach Boys album. In addition, we had unexpected competition from, of all people, our ex manager, Murry Wilson. After being fired,

my dad vowed to form a new group that would teach a lesson to "those

---

still own the copyrights to the songs, and could even pull them out of Sea of Tunes whenever I wanted.

"Brian, you've done a remarkable job in your writing and arrangements," he said. "We're all very proud of your leadership. But you should really try to temper your impatience with your brothers and those who don't have the same talent. Also, you need to keep your promises to your father."

"I didn't make any promises," I said. "Why do you do this to me?"

"Brian, I'm your father," he said. "I'm just trying to keep you on the straight and narrow. This is a business. I'm entitled. I've been your father all your life. I'm not doing anything that's unfair."

After months of daily calls, I finally relented and gave him 100 percent of the income from Sea of Tunes. Beaten and over-stressed, I [following information handwritten – just] wanted him off my back. [original text deleted and following information handwritten – move to 161 Toward the end of 1964, he demanded sole ownership of Sea of Tunes. Claiming [original text deleted] I'd promised it to him the day the company was formed, he resorted to psychological torture, withholding my latest songwriter [original text deleted] royalties, which were then a considerable $280,000.]

Straining under the pressure, I told everyone [original text deleted] I needed to be excused from the European tour. I wanted to stay home and write, something I couldn't do on the road. I didn't get any sympathy, though. At the airport, Mike lectured me about responsibility. [original text deleted] He called me a pussy.

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American, by the time we followed the Beatles on the Ed Sullivan Show. Before going on, I urged the guys to kick ass.

"How'd we do against the Beatles?" I asked Marilyn by phone when we got back to our hotel.

"You were great," she said. "I could hardly hear you over all the screaming."

"Yeah," I chuckled. "I guess we showed 'em."

Returning home, my bandmates began taking advantage of three years worth of success. Mike filed for divorce, Carl and Al bought houses, and Dennis continued his playboy habits. Their heads soared. Looking ahead to a 23-day tour of Europe, Mike and Dennis were more concerned about their social lives than the album that was due the first part of 1965, while I fretted about it day and night.

At one session, I berated all four of them for not caring as much as I did about making great music, then stormed out of the studio in a fit. The pressure was getting to me. But it was more than just writing and producing. My dad was playing a major head game with

me. Over the past couple of months, he had decided to go after my 50 percent of income from Sea of Tunes, [original text deleted and following information handwritten – the] publishing company. [following information handwritten – insert from p. 162 (here)]

It was like the movie "Gaslight." Knowing the pressure I was under and exactly how to take advantage of me, my dad telephoned nightly, reminding me that I had promised to give him my half of the publishing income. I denied ever having made a promise like that. But he insisted I had, then explained how I'd

* * *

In May 1963 Surfin' U.S.A. became the Beach Boys's first top 10 single. The original pressing listed me as the sole writer, but once it became a hit Chuck Berry claimed the melody was his, an inadvertent copy of Sweet Little Sixteen. There are plenty of musicologists who'd argue otherwise. [original text deleted] Later, Berry's publishing company, without contacting me, also [original text deleted and following information handwritten – claimed] the copyrights to the lyrics, which clearly weren't his. As a result, I haven't been paid a penny in royalties for 27 years.

Rather . . .

---

questioned me about the Beach Boys album, so I sat at the office piano and played *Surfin' U.S.A.*

"That's great," Jan said. "Why don't you let us record it?"

"No, that's for the Beach Boys," I said protectively. "But I've got some others. How about this?"

I pounded out another melody, singing the opening verse, "Two girls for every boy!" and the chorus.

"What's that one called?" Jan asked.

" 'Surf City,' " I said. "But I'm not done with it yet."

"Let me hear what you've got again," Jan said, sitting down next to me.

I played it several more times. Jan loved it and said he knew what needed to be done to finish it. Fine with me. I didn't mind [original text deleted and following information handwritten – letting] Jan and Dean [original text deleted and following information handwritten – record my] song. I thought Jan was a [original text deleted] genius in the studio and watching him cut records was a [original text deleted] righteous trip. He knew exactly what he needed and how to get it done. His records were clean, like the Four Seasons's records, but what I admired most was the way he mapped out everything that needed to be done in his head before he started.

My dad hated my admiration for Jan. He hated it more when he learned that I'd given them a song. He called them pirates and ordered me to stop hanging around with them.

"Jan Berry is just ripping off all your ideas," he snarled.

"Nonsense," I argued. "Jan and Dean are part of the same West Coast sound explosion that we are. There's nothing to worry about."

---

Stay interested? That wasn't the problem. I was trying to stay awake.

* * *

Back home, the record company was frantic to feed what they continued to think was a teenage fad. Pressuring us to make another album as quickly as possible, we no sooner unpacked than we began spending every day in the studio. Our second LP, "Surfin' USA," took less than a month to record, which accounts for the number of instrumentals on it. The first song we recorded, *Surfin' U.S.A.*, which also was the first single, owed itself to a number of influences, including Chuck Berry, Chubby Checker and Judy Bowles's little brother Jimmy. [original text deleted and following information handwritten – Having come up with a melody inspired by that song,] I thought, God, what about [original text deleted and following information handwritten – doing] surf lyrics [original text deleted and following information handwritten – and mention [following information handwritten – ing] every surf spot in the state. They're doing it here, there, in this city and that, like Chubby Checker's song *Twistin' U.S.A.* Judy's brother Jimmy was a surfer. I asked him to make a list of every surf spot he knew, and by God he didn't leave one out.

But that was about as smooth as it got for me. The balance of responsibility that would guide the Beach Boys wasn't completely defined yet. David Marks and Dennis weren't as devoted to music as they were to being popular and Carl was too young to be taken seriously. Mike, althought [sic] devoted to the group, was limited by a lack of musical talent, leaving me at the

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# WOULDN'T IT BE NICE
*My Own Story*

**BRIAN WILSON**
with Todd Gold

(LOGO) HarperCollins *Publishers*

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FIRST EDITION

*Designed by Cassandra J. Pappas*

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**THE STATE OF NEW HAMPSHIRE**

**APPEARANCE/WITHDRAWAL**

*County of* Hillsborough Southern District

*Court* Superior Court

_ COURT

_ JURY

Case No. 94-C-60573-WS

Brother Records, Inc., et al v. Harper Collins Publishers, et al

OF: _____

OF: _____

Returnable on the first Tuesday of

**APPEARANCE**

Please enter my appearance as:

_ counsel for: _____

X Pro se Eugene E. Landy

**WITHDRAWAL**

Please withdraw my appearance as:

_ counsel for: _____

Notice of withdrawal sent to my clients on _____

at the following address

I hereby certify that duplicates of this notice were:

___ delivered

to: see attached list

XX mailed

on December 9, 1994

Date

Signed /s/ Eugene E. Landy
Eugene E. Landy
Print or type name
Address c/o: Mr. Michael Sobel, Esq.
1206 N. Larrabee, St., West Hollywood, CA 90069
Telephone: (310) 659-9521

**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of December, 1994, I served the within Affidavit of Eugene E. Landy in Support of motions to Dismiss on the plaintiffs and on the remaining defendants by sending copies thereof by first-class mail to:

Beth George-Kane
Upton, Sanders & Smith
10 Centre Street
P.O. Box 1109
Concord, NH 03302

Michael J. Flynn, Esq.
Flynn, Sheridan & Tabb
One Boston Place
26th Floor
Boston, MA 02108

Brian D. Wilson
Jerome S. Billet, Conservator
Brains & Genius
c/o Douglas Day, Esq.
Crowe & Day
100 Wilshire Boulevard
Suite 200
Santa Monica, CA 90401-1111

Todd Gold
4448 Etherl Street
Studio City, CA 91607

HarperCollins Publishers, Inc.
10 E. 53rd
New York, NY 10022

Richard C. Gagliuso
Merril F. Hall
Deasy & Dwyer P.A.
400 Amherst Street, Ste. 201
Nashua, NH 03063

/s/ Alexandra Morgan
Alexandra Morgan

---

STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY SUPERIOR COURT
SOUTHERN DISTRICT

Brother Records, Inc.
Brother Tours, Inc. and
Alan Jardine

v.

HarperCollins Publishers, a corporation;
Brian D. Wilson
by and through Jerome S. Billet as Conservator
of the Estate and Person of Brian D. Wilson;
Todd Gold; Eugene Landy; Brains & Genius, a California
partnership of Eugene Landy and Brian D. Wilson;
and Does 1 through 50 inclusive

#94-CV-413

## AFFIDAVIT OF DEFENDANT EUGENE E. LANDY IN SUPPORT OF MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION

I, Eugene E. Landy, being first duly sworn, depose and say:

### General Contacts

1. I currently reside in Honolulu, Hawaii and Los Angeles, California. I have resided continuously in California since 1954. I am a psychologist, and I am 60 years old.

2. I have never lived in the State of New Hampshire, nor have I ever been to New Hampshire for any purpose.

3. I have no family in New Hampshire, and I have never owned real or personal property in New Hampshire.

4. I have never entered into any business transaction with an individual or entity from New Hampshire.

### Specific Contacts

5. Brains and Genius is a general partnership composed of Brian Wilson and myself, Eugene E. Landy. Brains and Genius also a Defendant is this case. At no time did Brains and Genius do business in the State of New Hampshire.

6. The manuscript was written, reviewed and edited in California. No portion of this work was done in New Hampshire.

7. Any payments made to Todd Gold by Brains and Genius for his services were paid in California by a check drawn on a California bank.

8. None of the individuals or entities mentioned in the manuscript including but not limited to the Plaintiffs in this case, reside or were located in New Hampshire. None of the events or activities described in the manuscript took place in New Hampshire.

9. I have not purposefully directed any actions related to the book into New Hampshire, and I had no reason whatsoever to anticipate, and in fact did not anticipate, that the activities described would subject me to the jurisdiction of the New Hampshire courts.

/s/ Eugene E. Landy
Eugene E. Landy

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Personally appeared before me this 9th day of December, 1994 the above-named Eugene E. Landy and swore that the foregoing statements subscribed by him are true and to the best of his knowledge and belief.

/s/ M. Lamorie
Notary Public

(SEAL)
M. LAMORIE
COMM. #1012331
NOTARY PUBLIC -
CALIFORNIA
LOS ANGELES COUNTY
My Comm. Expires
Dec. 26, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 1994, I served the within Affidavit of Eugene E. Landy in Support of Motions to Dismiss on the plaintiffs and on the remaining defendants by sending copies thereof, by first-class mail, to Attorneys Beth George-Kane, Michael J. Flynn, Michael Tabb and Vincent H. Chieffo, all counsel to the plaintiffs, and to Attorneys William L. Chapman, Bruce Rich and Katherine J. Daniels, counsel to defendant HarperCollins Publishers.

/s/ Alexandra Morgan
Alexandra Morgan

---

STATE OF NEW HAMPSHIRE

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and Does 1 through 50 inclusive

#94-CV-413

## JOINDER

1. I, Eugene E. Landy, appearing in pro se, hereby join in the motion for dismissal for lack of personal jurisdiction filed by Brains and Genius, Todd Gold and Brian Wilson by and through Jerome S. Billett as conservator of the person and the estate of Brian Wilson.

/s/ Eugene E. Landy
EUGENE E. LANDY

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Personally appeared before me on this 9th day of December, 1994 the above-named Eugene E. Landy and swore that the foregoing statements subscribed by him are true to the best of his knowledge and belief.

/s/ M. Lamorie
Notary Public

(SEAL)
M. LAMORIE
COMM. #1012331
NOTARY PUBLIC -
CALIFORNIA
LOS ANGELES COUNTY
My Comm. Expires
Dec. 26, 1997

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400 Amherst Street, Ste. 201
Nashua, NH 03063

/s/ Alexandra Morgan
Alexandra Morgan

**28 U.S.C. § 1257. State courts; certiorari**

**(a)** Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

**(b)** For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

(June 25, 1948, c. 646, 62 Stat. 929; July 29, 1970, Pub.L. 91-358. Title I, § 172(a)(1), 84 Stat. 590; June 27, 1988. Pub.L. 100-352, § 3, 102 Stat. 662.)

## NEW HAMPSHIRE STATUTES ANNOTATED
## TITLE LII. ACTIONS, PROCESS, AND SERVICE OF PROCESS
## CHAPTER 510. SERVICE OF WRITS

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§ 510:4. Nonresident Defendant

I. JURISDICTION. Any person who is not an inhabitant of this state and who, in person or through an agent, transacts any business within this state, commits a tortious act within this state, or has the ownership, use, or possession of any real or personal property situated in this state submits himself, or his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from or growing out of the acts enumerated above.

II. Service of Process on Secretary of State. Service of process upon any person who is subject to the jurisdiction of this state, as provided in this section, may be made by leaving a copy thereof, with a fee of $10, in the hands or office of the secretary of state. Such service shall be of the same legal force and effect as if served on the defendant at his abode or place of business in the state or country where he resides and according to the law of that state or country, provided that notice thereof and a copy of the process is forthwith sent by registered mail, postage prepaid, by the plaintiff or his attorney to the defendant at his last known abode or place of business in the state or country in which the defendant resides. The defendant's return receipt and an affidavit of the plaintiff or his attorney of compliance with the section shall be appended to the process and entered therewith. In the

event that the notice and a copy of the process are not delivered to or accepted by the defendant, the court may order such additional notice, if any, as justice may require.

III. RECORD OF PROCESS. The secretary of state shall keep a record of all process served in accordance with this section, and said record shall show the date and hour of service in the hands or office of the secretary of state.

IV. CONTINUANCE OF ACTION; COSTS. The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action. The fee of $3 paid to the secretary of state by the plaintiff at the time of the service shall be taxed in his costs if he prevails in his suit.

V. SERVICE NOT EXCLUSIVE. The method of service provided by this section is not exclusive and service on nonresident individuals may be made in any other manner provided by law.

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

DOCKET NO.

1995 TERM

MARCH SESSION

BROTHER RECORDS, INC.,
BROTHER TOURS, INC. AND ALAN JARDINE

v.

HARPERCOLLINS PUBLISHERS, A CORPORATION; BRIAN D. WILSON, AN INDIVIDUAL, BY AND THROUGH JEROME S. BILLET AS CONSERVATOR OF THE ESTATE AND PERSON OF BRIAN D. WILSON; TODD GOLD, AN INDIVIDUAL; EUGENE LANDY, AN INDIVIDUAL; BRAINS AND GENIUS, A CALIFORNIA PARTNERSHIP OF EUGENE LANDY AND BRIAN D. WILSON; AND DOES 1 THROUGH 50 INCLUSIVE

---

NOTICE OF APPEAL

---

Appeal from Hillsborough County Superior Court
Pursuant to Supreme Court Rule 7

---

Richard C. Gagliuso, Esquire
DEASY & DWYER P.A.
400 Amherst Street, Suite 201
P.O. Box 6180
Nashua, New Hampshire 03063-6180

**SUPREME COURT DOCKET NO.**
**NOTICE OF APPEAL**
**(Rule 7)**

**Within thirty days from the date on the clerk's written notice of a decision on the merits, unless otherwise provided by law and except as otherwise provided by Rule 7 in criminal and probate appeals, the moving party shall file (a) 1 copy of this notice of appeal and of the attachments to it with each of the other parties, and with the attorney general in a criminal case: (b) either 2 or 3 copies with the clerk of the lower court depending upon whether a judge, or master and judge, decided the case: and (c) the original and 15 copies with the clerk of the supreme court. The moving party shall pay the filing fee simultaneously with the filing of the notice of appeal.**

---

**CASE TITLE (Full Name)**

Brother Records, Inc., Brother Tours, Inc. and Alan Jardine
v.
HarperCollins Publishers, a corporation; Brian D. Wilson, an individual, by and through Jerome S. Billet as Conservator of the Estate and Person of Brian D. Wilson; Todd Gold, an individual; Eugene Landy, an individual; Brains and Genius, a California partnership of Eugene Landy and Brian D. Wilson; and DOES 1 through 50 inclusive

**APPEAL FROM** HILLSBOROUGH COUNTY SUPERIOR **COURT**, SOUTHERN DISTRICT
**Date of:**
**(a) clerk's notice**: March 1, 1995
**(b) sentencing (criminal)**
**(c) probate court filing**

**Trial Judge; Master;**
Walter L. Murphy, P.J.

**Which side is the moving party: Plaintiff, defendant or other?**

Defendants Brian D. Wilson, by and through Jerome S. Billet, Conservator of the Estate and Person of Brian D. Wilson, Todd Gold and Brains and Genius

**If other, please specify:**
**If CRIMINAL case, please fill out the following:**
**Is defendant in jail?**
**Where incarcerated?**
**What is sentence?**
**Was trial counsel court appointed?**

**Will the appellate defender be handling the appeal?**

**Court Reporter:** Lisa Jones

**Docket No. below:**
94-C-573-WS

**Trial Counsel below:**
**For Plaintiffs:**

Michael Tabb, Esquire
Beth George-Kane, Esquire

**For Defendants:**

Richard C. Gagliuso, Esquire
Meriel F. Hall, Esquire

**If party is a corporation or association, give names and addresses or parent, subsidiaries, and affiliates (to extent known):**

---

| **Moving Party's Counsel In Supreme Court:** | **Name Address Phone** |
|---|---|
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|---|---|
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**Number of days of trial: Dates of hearing and/or trial:**

One February 10, 1995

**Does the moving party waive oral argument?** No

**List exhibits necessary to determine the questions raised on appeal:**

**PLAINTIFFS' EXHIBITS**

None. See Affidavit of Philip Stillman with exhibits and Affidavit of Elliott Lott in Appendix.

**DEFENDANTS' EXHIBITS**

None. See Affidavit of Jerome Billet with exhibits, Affidavit of Ronald E. Guttman with exhibits and Affidavit of Todd Gold in Appendix.

**BRIEF DESCRIPTION OF NATURE OF CASE AND RESULT:**

This is an action for defamation and related torts brought by Writ of Summons returnable to the Hillsborough County Superior Court for the Southern District on the first Tuesday of November, 1994. It arises out

of a book published in 1991 and entitled, "Wouldn't It Be Nice" ("the Book"). The Book purported to be the autobiography of Brian Wilson ("Wilson"), one of the founding members of the popular musical group, "The Beach Boys." Wilson and Todd Gold ("Gold"), a free-lance writer, were credited with authorship of the Book.

The plaintiffs are Alan Jardine, a member of The Beach Boys, and two corporations, Brother Records, Inc. and Brother Tours, Inc., through which The Beach Boys conduct their business. The defendants are Wilson, by and through the court-appointed conservator of his person and estate; Gold; Eugene Landy ("Landy"), a psychologist who once treated Wilson and is alleged to have been responsible for much of the content of the Book; and a partnership called "Brains and Genius," which allegedly consisted of Wilson and Landy ("the Partnership"). The Partnership contracted with Gold for the preparation of a manuscript, and later contracted with defendant HarperCollins Publishers for publication of the Book.

None of the parties has had any significant contact with New Hampshire. The Book did not mention anyone with significant contacts with New Hampshire. Nevertheless, the plaintiffs brought this action in New Hampshire after waiting until the statute of limitations on their claims had run in California and, apparently, all but two other jurisdictions.

Defendants Wilson, Gold and the Partnership appeared specially and then filed timely Motions to Dismiss for Lack of Personal Jurisdiction. These Motions were supported by the Affidavits of Jerome Billet,

Wilson's conservator, Gold, and Ronald Guttman, a California attorney. They were also supported by an extensive Memorandum of Law.

In their Motions, the defendants asserted that the plaintiffs had not sustained their burden of establishing sufficient "minimum contacts" between the defendants and New Hampshire such that the exercise of jurisdiction over them by the courts of this State would be consistent with the Due Process Clause of the 14th Amendment to the United States Constitution. The defendants also contended that, even if such "minimum contacts" were present, the exercise of jurisdiction over them under these circumstances would not comport with "traditional notions of fair play and substantial justice."

The plaintiffs objected to the Motions to Dismiss, supporting their Objection with the Affidavits of two individuals affiliated with The Beach Boys. The plaintiffs argued that the allegations in their Writ, together with the Affidavits, established "minimum contacts" sufficient for the exercise of specific jurisdiction over the defendants. No party having requested an evidentiary hearing, the Court then scheduled a nonevidentiary hearing for February 10, 1995.

The hearing was held as scheduled, and consisted of extended oral argument by counsel. The Court then took the Motions under advisement. On March 1, 1995, the Court issued an Order denying the defendants' Motions to Dismiss. The Court rejected the defendants' argument that the plaintiffs had not established sufficient "minimum contacts" between the defendants and the forum to permit the exercise of personal jurisdiction over them, as

well as the argument that the exercise of jurisdiction would offend "traditional notions of fair play and substantial justice."

**STATUTE, ORDINANCE, REGULATION, RULE, OR OTHER LEGAL AUTHORITY UPON WHICH THE CLAIM OF CIVIL OR CRIMINAL LIABILITY WAS BASED:**

The plaintiffs' claim that the courts of this State may constitutionally exercise personal jurisdiction over the defendants is based primarily on three decisions:

1. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).
2. *Calder v. Jones*, 465 U.S. 783 (1984).
3. *Buckley v. McGraw-Hill, Inc.*, 762 F.Supp. 430 (D.N.H. 1991).

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**SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. SEE RULE 7(7). STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH. SEE RULE 16(3)(b).**

1. Whether the Superior Court erred in ruling that the plaintiffs, residents of California, had sustained their burden of establishing such "minimum contacts" between the defendants, all residents of California, and the State of New Hampshire as constitutionally to permit the exercise of specific personal jurisdiction over them, where:

   A. Defendant Gold was shown by uncontradicted evidence to have entered into a

contract in California to write a manuscript, to have researched the project in California, to have written the manuscript in California, to have participated in editing the manuscript in California, and to have had no control whatsoever over the publication of the Book or its distribution in New Hampshire;

B. Defendant Wilson was shown, by uncontradicted evidence, not to have written the manuscript for the Book, to have had only limited involvement in editing the manuscript, to have participated in a publicity tour which did not include New Hampshire, and to have had no control whatsoever over the publication of the Book or its distribution in New Hampshire; and

C. The defendant Partnership was shown, by uncontradicted evidence, to have hired Gold in California to write the manuscript, to have had only limited involvement in editing the manuscript, and to have relinquished to HarperCollins complete control over "all details of publication, including manufacture, format and design, distribution, pricing, advertising and promotion and distribution of free copies [of the Book]."

2. Whether the Superior Court erred in ruling that the plaintiffs had sustained their burden of establishing that the exercise of specific personal jurisdiction over the defendants, under the circumstances described in question #1 above, requiring the defendants to defend this action 3000 miles from their homes, would not "offend traditional notions of fair play and substantial justice."

**WITH REFERENCE TO EACH SPECIFIC QUESTION RAISED ON APPEAL, IDENTIFYING THE QUESTION BY ITS NUMBER, SPECIFY:**

**(A) The proper standard of review to be applied by the court to the question, citing relevant authority;**

**(B) the parts of the proceeding you would designate the court reporter to transcribe, or whether an adequate written substitute could be provided in place of a transcript; and**

**(C) the case(s) most relied upon to support the moving party's position:**

Question 1:

A. This Court will "take as true the facts . . . properly pleaded [by the plaintiffs] and construe reasonable inferences therefrom in the light most favorable to [them]." *Mosier v. Brattleboro Memorial Hosoital,* ___ N.H. ___ (slip op. March 1, 1995). It will not, however, "assume the truth or accuracy of any allegations which are not well-pleaded, including the statement of conclusions of fact and principles of law." *Id.* Where the Superior Court's factual determinations were based exclusively upon a review of submitted documents, all of which are available to this Court, the scope of this Court's review is broadened because the Superior Court was in no better position to decide the issue than the Supreme Court will be. *Providence Mutual Fire Insurance Co. v. Scanlon,* 138 N.H. 301 (1994); *McGovern v. Secretary of State,* 138 N.H. 128 (1993); *Masse v. Commercial Union Ins. Co,* 136 N.H. 628 (1993); *Hillside Association of Hollis v. Maine Bonding & Casualty Co.,* 135 N.H. 325 (1992).

B. Entire transcript of hearing of February 10, 1995.

C. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Calder v. Jones*, 465 U.S. 783 (1984); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987); *Altshuler Geneological Service v. Farris*, 128 N.H. 98 (1986); *Phelps v. Kingston*, 130 N.H. 166 (1987); *Mosier v. Brattleboro Memorial Hospital*, ___ N.H. ___ (slip op. March 1, 1995); *Wilson v. Belin*, 20 F.3d 644 (5th Cir. 1994).

Question 2:

A. Same as Question 1 above.

B. Same as Question 1 above.

C. Same as Question 1 above.

**If the most extensive transcript designated above were ordered by the court, what is the court reporter's estimate (obtain directly from trial court clerk) of the number of Pages and cost thereof:**

**Pages:**150 **Cost:**$562.50

**A DIRECT AND CONCISE STATEMENT OF THE REASONS WHY A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE QUESTIONS AND WHY THE ACCEPTANCE OF THE APPEAL WOULD PROTECT A PARTY FROM SUBSTANTIAL AND IRREPARABLE INJURY, OR PRESENT THE OPPORTUNITY TO DECIDE, MODIFY, OR CLARIFY AN ISSUE OF GENERAL IMPORTANCE IN THE ADMINISTRATION OF JUSTICE:**

In denying the defendants' Motions to Dismiss for Lack of Personal Jurisdiction, the Superior Court relied

primarily on two U.S. Supreme Court decisions addressing personal jurisdiction in the context of "multi-state libel": *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); and *Calder v. Jones*, 465 U.S. 783 (1984).

The plaintiffs cited these two cases in their Memorandum, but conceded that neither "deals with the exact situation raised by the [defendants'] motions." The Superior Court also acknowledged that they were not "directly on point," but nevertheless ruled that they were "dispositive on the personal jurisdiction issue."

In both *Keeton, supra,* and *Calder, supra,* the U.S. Supreme Court upheld the exercise of personal jurisdiction over a non-resident defendant in a libel action. Neither case, however, involved fact patterns bearing significant similarity to the case at bar. In *Keeton,* the *regular* and *widespread* distribution of a magazine in New Hampshire *by the defendant publisher* was the critical fact upon which the Supreme Court relied in upholding the exercise of jurisdiction over the publisher. By contrast, the publication of the Book was an isolated event, and none of the moving defendants in the instant case were responsible for its distribution in New Hampshire.[1]

In *Calder,* the preeminent fact was the plaintiff's residence in the forum state, in which state the Court found that the defendants had every reason to know that their allegedly defamatory statements, directed exclusively toward the plaintiff, would cause the greatest harm. Here, by contrast, the plaintiffs are California residents who

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[1] Defendant HarperCollins Publishers, the publisher of the Book, did not move to dismiss for lack of jurisdiction.

were among the many subjects of the Book. Applying the reasoning of *Calder*, the defendants arguably should have understood that their actions would subject them to jurisdiction in *California*, but by no means were they fairly apprised that they might have to defend a libel action in New Hampshire.

The plaintiffs argue that neither *Keeton* nor *Calder* "represent[s] the boundary of personal jurisdiction." In doing so, they implicitly recognize that the United States Supreme Court has *never* extended personal jurisdiction to non-resident defendants in the position of the defendants herein. To the contrary, the fundamental principles of "minimum contacts" analysis, well established through other decisions of the U.S. Supreme Court, lead to the conclusion that personal jurisdiction may not be exercised over these defendants. This case squarely presents, therefore, the question whether the limits of personal jurisdiction in so-called "multi-state libel" cases should be expanded beyond those established by the U.S. Supreme Court in 1984.

This case also raises the independent question whether the exercise of jurisdiction over these defendants comports with "traditional notions of fair play and substantial justice." This determination, which must be made even where the court finds that "minimum contacts" exist, depends on several factors, the most important of which is the burden on the defendants of having to defend the action far from their place of residence. In this case, of course, such burden could hardly be greater.

Unless this Court accepts this appeal, the defendants will be required to defend on the merits, at enormous

expense and, in Wilson's case, substantial disadvantage due to his status as a ward. This result will be based on a decision of the Superior Court which has expanded U.S. Supreme Court precedent beyond the limits which that Court, or any other state or federal court, has set. Under these circumstances, this Court should accept the appeal in order to protect the right of the defendants not to be improperly subjected to the jurisdiction of the courts of this State.

Furthermore, this case presents the Court with an opportunity to clarify the scope of its own prior decisions with respect to personal jurisdiction, and to determine whether or not the U.S. Supreme Court decisions relied upon by the plaintiffs and the Superior Court should be extended to these facts. This case raises issues of federal constitutional importance, and this Court should address these issues rather than leave them to the decision of the Superior Court as the final order of the courts of this State.

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**TITLE OF CASES WITH SIMILAR OR IDENTICAL ISSUES PENDING, OR EXPECTED TO BE ENTERED, IN THE SUPREME COURT (TO EXTENT KNOWN):**

None known.

**ATTACH TO THIS FORM THE DECISION BELOW AND ONLY SUCH OTHER PLEADINGS AND DOCUMENTS AS THE COURT NEEDS TO EVALUATE THE SPECIFIC QUESTIONS RAISED ON APPEAL. LEGAL MEMORANDA SHALL NOT BE SUBMITTED WITHOUT THE PRIOR APPROVAL OF THE CLERK. INCLUDE A TABLE OF CONTENTS LISTING EACH ATTACHMENT AND REFERRING TO SEQUENTIALLY NUMBERED PAGES. IF THE PARTIES' REQUESTS FOR FINDINGS AND RULINGS ARE ATTACHED, NOTE ON THE RIGHT SIDE OF PAGE WHETHER EACH REQUEST WAS GRANTED, DENIED, OR NOT RULED UPON (RULE 6(5)]. REGARDING THE TEXT OF RELEVANT CONSTITUTIONAL, STATUTORY, AND OTHER DOCUMENTS. SEE RULE 7(6).** See Appendix.

CERTIFICATIONS

1. **I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.**

**/s/ Richard C. Gagliuso**
**Counsel**

2. **I hereby certify that copies of this notice of appeal have been served on all parties to the case and have been filed with the clerk of court from which the appeal is taken in accordance with Rule 26(2).**

**/s/ Richard C. Gagliuso**
**Moving Party or Counsel**

notapp.wil

No. 96-1018

Supreme Court, U.S.
FILED
JAN 27 1997
CLERK

In The

# Supreme Court of the United States

October Term, 1996

BRIAN D. WILSON, an individual,
by and through Melinda Wilson as Conservator
of the Person and Estate of Brian D. Wilson,
TODD GOLD, an individual,
and
BRAINS AND GENIUS, a California partnership,

*Petitioners,*

v.

BROTHER RECORDS, INC., a California corporation,
BROTHER TOURS, INC., a California corporation,
and
ALAN JARDINE, an individual,

*Respondents.*

**On Petition For Writ Of Certiorari**
**To The Supreme Court Of The State Of New Hampshire**

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a state court may constitutionally exercise personal jurisdiction over out-of-state libel defendants who wrote a book they knew would injure the non-resident plaintiffs' reputation in the forum state, when the defendants intended to have the book distributed in the forum state, engaged in promotional activities designed to increase sales of the book in the forum state and elsewhere, and had a direct economic interest in sales of the book in the forum state?

## CORPORATE DISCLOSURE STATEMENT

Brother Records, Inc. and Brother Tours, Inc. are California corporations which are closely held. Neither entity has a parent company. Neither entity possesses any non-wholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

CORPORATE DISCLOSURE STATEMENT ..... ii

STATEMENT OF THE CASE ..... 1

REASONS FOR DENYING THE PETITION ..... 6

A. The Federal Issue Presented By This Case Is Fact Specific And Is Controlled By Established Principles This Court Has Clearly Articulated in Past Decisions ..... 6

B. The Supreme Court of New Hampshire's Ruling Does Not Conflict With Any of The Relevant Decisions of This Court ..... 9

C. The Supreme Court of New Hampshire's Decision Does Not Conflict With Any Decisions of United States Courts of Appeals ..... 14

CONCLUSION ..... 18

## TABLE OF AUTHORITIES

Page

CASES

*Asahi Metal Industries, Co. Ltd. v. Superior Court of California, Solana County*, 480 U.S. 102 (1988) ...12, 13

*Buckley v. McGraw-Hill, Inc.*, 762 F.Supp. 430 (D.N.H. 1991) ..... 8

*Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) ..... 8, 11, 17

*Calder v. Jones*, 465 U.S. 783 (1984) ..... 8, 9, 10

*Estabrook v. Wetmore*, 129 N.H. 520, 521 A.2d 956 (1987) ..... 15

*Faigin v. Kelly*,. 919 F.Supp. 526 (D.N.H. 1996) ..... 7

*Gray v. St. Martin's Press, Inc.*, 929 F.Supp. 40 (D.N.H. 1996) ..... 7

*International Shoe Co. v. Washington*, 326 U.S. 310 (1945) ..... 10

*Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) ..... 7, 8, 9, 10, 15

*McFarlane v. Esquire Magazine*, 74 F.3d 1296 (D.C. Cir.), *cert. denied*, 117 S.Ct. 53 (1996) ..... 14, 15, 16

*Moncrief v. Lexington Herald-Leader Co.*, 807 F.2d 217 (D.C. Cir. 1986) ..... 15

*Parsons v. Mains*, 580 A.2d 1329 (D.C. 1990) ..... 15

*Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110 (6th Cir.), *cert. denied*, 115 S.Ct. 423 (1994) ..... 14, 16, 17

*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) ..... 8, 11, 12

TABLE OF AUTHORITIES – Continued

Page

STATUTES

D.C. Code 1981 § 13-423(a) .....14, 15

N.H. Rev.Stat.Ann. § 510:4 ..... 15

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Brother Records, Inc., Brother Tours, Inc. and Alan Jardine respectfully submit the following Brief In Opposition to Petition For Writ of Certiorari.

## STATEMENT OF THE CASE

Respondents concur in the procedural history of the case set forth on page 7 of the Petition for Writ of Certiorari submitted by Petitioners Brian D. Wilson, Todd Gold and Brains and Genius. Respondents, however, believe that the Petitioners have neglected to inform the Court of many important facts necessary for permitting the Court to determine whether a Writ of Certiorari should be granted in this case.

This action for defamation and other related torts arises out of the 1991 publication of *Wouldn't It Be Nice*, a book which labels itself as an autobiography of Petitioner, Brian D. Wilson ("Wilson"). Wilson is a founding member of the popular music group, the Beach Boys. The plaintiffs below are Respondents Brother Records, Inc., Brother Tours, Inc. (collectively, "Brother") and Alan Jardine. Brother are the corporations through which the Beach Boys conduct their business activities. Alan Jardine is one of the members of the Beach Boys band. App. 34, 41.

Although *Wouldn't It Be Nice* purports to be Wilson's memoirs, Wilson has suffered from severe mental illness

since the mid 1960s. App. 45.[1] During the 1980s, Wilson fell under the influence of Eugene Landy, an unorthodox psychologist who is a defendant below, but who waived his defense of lack of personal jurisdiction. App. 14-15. In the name of "therapy", Landy took control of Wilson's music and business interests. After the California Board of Medical Quality Assurance threatened to commence disciplinary proceedings because of conflicts of interest, Landy surrendered his license to practice psychology and became Wilson's "business manager". In either capacity, according to Respondents' Complaint, Landy had complete control over all aspects of Wilson's life. This resulted in members of Wilson's family petitioning the California Superior Court to impose a conservatorship over Wilson to free him from Landy's influence. App. 42-43. It also resulted in substantial negative publicity about Landy in the national media.

With a battle over Landy's relationship with Wilson being fought in the courts and the media, Landy recognized that he could use Wilson's "autobiography" as a weapon to win the war. Landy realized there was considerable public interest in Wilson's unusual life, and he could use such a book to tell his side of the story. A major theme of the book became that it was the Beach Boys' exploitation of Wilson's talent that had caused Wilson's mental illness, and that Landy's unorthodox treatments

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[1] In other legal proceedings Wilson claimed he was legally incompetent during most of the period recounted in *Wouldn't It Be Nice*. App. 45. In 1992, shortly after the book was published, the California Superior Court appointed a conservator for Wilson's person and estate. App. 69.

were necessary to save Wilson from his band mates. App. 44.

Landy and Wilson also viewed the autobiography as an opportunity to make money. They formed a new business entity, Petitioner Brains and Genius, a partnership, to produce the book and have it published. To attract a publisher, they distributed a proposal to numerous publishing houses which emphasized the national market for a book about Wilson and the Beach Boys. The Proposal emphasized that hundreds of millions of Beach Boys' recordings had been sold throughout the country, that the Beach Boys were one of the most popular and profitable touring attractions in music, and that dozens of articles on the Beach Boys had appeared in national magazines. App. 172-173. The publisher of an autobiography of Brian Wilson, the Proposal argued, could exploit this huge market for information and gossip about one of the country's most popular rock bands. The proposal also emphasized that Landy and Wilson were willing to participate in a "full publicity tour" to assist the marketing of the finished work. App. 174.

As a result of the Proposal, Brains and Genius signed a publishing agreement with Harper & Row, Inc. the predecessor of Respondent HarperCollins Publishers, Inc. ("HarperCollins"). That agreement is further evidence that the Petitioners intended to distribute *Wouldn't It Be Nice* nationally. In the publishing agreement Brains and Genius granted HarperCollins the exclusive right to distribute the book "throughout the United States". App. 135. Wilson agreed to "participate in a four-week author promotion tour covering a minimum of twelve cities"

when the book was initially published. He was also obligated to participate in a satellite tour, to make appearances on major network television shows and to appear at a trade show convention to publicize the book. App. 138-139. Moreover, if the publisher decided to publish a trade paperback edition, Wilson was required to perform a second publicity tour. *Id.* Brains and Genius, under the contract, would receive a royalty equal to a percentage of the suggested customer's price or the amount received by the publisher for each copy of the book sold. App. 140-143.

Brains and Genius also entered into a contract with Petitioner Todd Gold ("Gold"), a professional writer. Gold was hired to research and write the manuscript and was required to insert any "changes, editions, eliminations" Wilson and/or Landy deemed necessary or desirable. App. 120. Gold knew he was supposed to create a book that would generate national interest. He participated in the creation of the Proposal and the term of his services was to last "until the general release of the Autobiography through normal retail channels in the United States". App. 119-120, 167. Further, Gold's contract, like Brains and Genius' publishing agreement, gave Gold a personal financial stake in every copy of the book sold in New Hampshire and elsewhere. Gold was entitled to one third of the "net income" derived from the book, which included one third of the royalties Brains and Genius received from nationwide book sales. App. 123.

In its final form, *Wouldn't It Be Nice* was the type of sensational "kiss and tell" book foreshadowed by Brains and Genius' proposal. Its dust jacket promised readers that they would learn "the truth about the rumors and

myth" concerning the Beach Boys, as well as "the bitter infighting among Brian and the Beach Boys, which continues to this day". App. 178. The book is filled with gossip about the band and the Beach Boys are depicted in an unflattering light, to say the least.[2] Much of what is depicted in the book, however, is false. Freed from Landy's influence, even Wilson, in subsequent legal proceedings, admitted that much of the book was "garbage". He has used even stronger epithets to describe the work. App. 51-52.

Wilson did tour in support of the book. He appeared on national television shows to publicize the "autobiography" and conducted numerous interviews. Although Wilson did not actually set foot in New Hampshire as part of the publicity tour, some of the print and radio interviews he did in support of the book were directed to the New England audience, and some were broadcast within New Hampshire. The Complaint alleges that some of these interviews repeated the defamatory allegations. App. 46. Thousands of copies of the book were distributed in the state, and at the time the Complaint was filed, the book was still available in New Hampshire libraries and bookstores. App. 46.

Based on the evidence summarized above, the Supreme Court of New Hampshire concluded that each of the Petitioners "deliberately exploited the New Hampshire market". App. 32. Consistent with this conclusion, it

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[2] A summary of the statements in the book alleged to be defamatory is found in paragraph 22 of the Complaint. App. 47-51.

found that it was reasonably foreseeable that the Petitioners would be sued in New Hampshire in connection with the publication of *Wouldn't It Be Nice*, and that each of the Petitioners had sufficient contacts with New Hampshire to justify the exercise of jurisdiction. App. 33-34.

## REASONS FOR DENYING THE PETITION

### A. The Federal Issue Presented By This Case Is Fact Specific And Is Controlled By Established Principles This Court Has Clearly Articulated In Past Decisions

Respondents admit there are interesting aspects to this case, particularly since it concerns individuals who are well known to the public. *Wouldn't It Be Nice* is literally replete with sex, drugs and rock 'n roll. But an interesting case is not the same thing as an important case, and this case does not raise issues sufficiently worthy of this Court's attention. The constitutional issue arises from a fact pattern which does not frequently occur. Moreover, the issues can easily be decided by applying established jurisdictional principles which have been plainly articulated in the Court's prior precedents. A decision in this case is unlikely to add anything to this Court's jurisprudence on the requirements of personal jurisdiction.

The issue raised by this case – whether a non-resident author can properly be sued in a jurisdiction which is not the residence of the plaintiff or the forum most closely connected with an allegedly libelous work – is one

which infrequently arises. Such controversies are rare because most defamation actions are commenced in the plaintiff's home forum, and most states have enacted borrowing statutes which apply the statute of limitations of the plaintiff's home jurisdiction, providing little reason to institute suit in a foreign forum. In those unusual cases where a non-resident libel action is instituted, whether state courts can exercise personal jurisdiction over the non-resident author is usually a question of little practical significance. If the author is an employee of the publisher or distributor, the latter is liable for the author's work under respondeat superior, the standard for liability is identical, and under *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), there is usually jurisdiction over the publisher or distributor. Thus, it is only in cases like this one, where the author has independently contracted with the publisher, and their standards of liability may be different, that jurisdictional questions regarding the author become significant.

The rarity of this issue arising is demonstrated by the fact that more than a dozen years after this Court's decision in *Keeton*, this is the first time any appellate court has examined the constitutionality of exercising jurisdiction over a non-resident author in a libel action filed by a non-resident. Indeed, prior to the Supreme Court of New Hampshire's decision in this case, the only three reported decisions on this issue were from the District Court for the District of New Hampshire. See *Gray v. St. Martin's Press, Inc.*, 929 F.Supp. 40, 47-48 (D.N.H. 1996) (New Hampshire had jurisdiction over author who claimed that a Florida resident, a former Washington lobbyist, had improperly influenced national politicians). *Faigin v.*

*Kelly*, 919 F.Supp. 526, 532-533 (D.N.H. 1996) (New Hampshire had jurisdiction over authors of an autobiography of a football quarterback who never played in New Hampshire); *Buckley v. McGraw-Hill, Inc.*, 762 F.Supp. 430, 436-439 (D.N.H. 1991) (New Hampshire had jurisdiction over Business Week editors and reporters who collaborated on an article concerning a Pennsylvania executive). Petitioners' claim that an important constitutional issue is at stake cannot be accepted when the issue has almost never been reported.

A novel factual scenario may still give rise to an important case if the federal issues have never been considered by the Court, or the area requires elucidation because of conflicting precedents or new developments. But that is not the case here. The Court has addressed jurisdictional problems which arise in multi-state libel actions in *Keeton* and *Calder v. Jones*, 465 U.S. 783 (1984). The parties actually agree that the Court's prior jurisdictional precedents, *Calder, Keeton, Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) state the principles which apply to this case and neither side urges the Court to reconsider its prior rulings. The principle disagreement is whether the Supreme Court of New Hampshire properly applied those principles to the specific facts in this case, and whether the evidence supported that court's conclusion that Petitioners had deliberately exploited the New Hampshire market.

These are the types of issues which do not require the intervention of the United States Supreme Court. It is well established that this Court's function is not merely to review the decisions of the nation's appellate courts for

potential errors. Yet that is precisely what the Petitioners seek here. They ask this Court personally to apply the standards it has previously enunciated to insure the Supreme Court of New Hampshire properly performed its job. When such an exercise will neither lead to further development of the law, or provide guidance to the nation's courts on issues they will regularly address, granting a writ of certiorari would constitute a waste of this Court's valuable resources.

### B. The Supreme Court of New Hampshire's Ruling Does Not Conflict With Any of The Relevant Decisions of This Court

Petitioners argue that the lower court's decision conflicts with this Court's precedents because neither *Calder* or *Keeton* expressly authorized the exercise of jurisdiction over non-resident authors in these circumstances within the four corners of those decisions. They assert that the jurisdictional bases described in *Keeton* and *Calder* are limited to the specific facts in those cases. Thus, Petitioners argue that *Keeton* limits a non-resident plaintiff's ability to bring a libel action against non-resident defendants to those media companies who continuously engage in the sale of thousands of copies of their product within the forum. Similarly, according to the Petitioners, an out-of-state author can only be successfully sued in the single jurisdiction which was the "focal point" of an allegedly defamatory work and where the bulk of harm caused by the work occurred.

There is no question that the factors identified by the Petitioners were relevant factors which the Court relied

upon in making its decision in those cases. But nothing in either *Keeton* or *Calder* indicated that those decisions staked the furthest boundary of personal jurisdiction in multi-state defamation claims. Both cases' unanimous decisions strongly suggest that this Court recognized that the exercise of personal jurisdiction in those situations was well within "the traditional notions of fair play and substantial justice" which this Court has outlined since its decision in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

The Supreme Court of New Hampshire's decision is completely consistent with the principles of *Keeton* and *Calder*. In *Keeton* this Court recognized that a state which might not have the most direct connection with a libel plaintiff may still have a substantial interest in hosting a libel claim based on a national publication. 465 U.S. at 775-777. In particular, the Court recognized that although a greater quantity of harm might have occurred in other jurisdictions, the circulation of defamatory material in New Hampshire constitutes tortious conduct within the state which New Hampshire has an interest in deterring. *Id.* at 776-777. On the very same day, this Court also recognized in *Calder* that jurisdiction could properly attach over an out-of-state author or editor whose only contact with the jurisdiction was the ability to destroy a reputation within the state. 476 U.S. 788-790. Although in the specific case before it the Court noted that the brunt of the injury caused by the defendants' actions would likely be felt in the forum, it also made it plain that "[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly caused the injury in California". *Id.* at

790. Where the Petitioners knew their work would be circulated in New Hampshire and also knew that such circulation would damage the Respondents' reputation in that state, the same logic compels a finding of jurisdiction here.

The Supreme Court of New Hampshire's decision is also consistent with this Court's holdings in non-libel cases. Although HarperCollins was the party that actually distributed *Wouldn't It Be Nice* in New Hampshire, it was the Petitioners who "manufactured" the product HarperCollins distributed. The publishing contract gave Brains and Genius control over the final content of the book. App. 137. Thus, when Petitioners' product tortiously caused injuries in the jurisdiction into which it was shipped, modern jurisdictional principles clearly establish that the New Hampshire courts could properly hold the product's creators responsible for the damage. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297-298, this Court stated that when a commercial actor attempts

> "to serve directly or indirectly the market for its products in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has been a source of injury to its owners or to others. The forum State does not exceed its power under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State".

See also *Burger King v. Rudzewicz*, 471 U.S. 462, 473 (1985). There is no reason why this well-recognized theory of

jurisdiction would only permit states to exercise jurisdiction over the creators of automobiles, defective appliances and boilers, but not books. The Supreme Court of New Hampshire's decision was consistent with the principles stated in *World-Wide Volkswagen*.

Notwithstanding clear precedents permitting the New Hampshire court's action, Petitioners assert that the lower court's decision is in conflict with *Asahi Metal Industries, Co. v. Superior Court of California, Solana County*, 480 U.S. 102, 110-113 (1988). There are several difficulties with this argument. First, the portion of *Asahi Metal* which Petitioners rely upon, Part II-A of Justice O'Connor's opinion, was not adopted by the entire Court and is only a plurality decision. Second, *Asahi Metal* is factually distinguishable. There, the defendant was the manufacturer of a valve stem, which was purchased by a manufacturer of tire tubes, whose product was in turn purchased by a manufacturer of tires, which product was in turn purchased by Honda for incorporation into a motorcycle. Honda itself appears to have shipped the finished motorcycle into the United States through a distributor. The defendant, accordingly, was several times removed from the entity which introduced the product into the state, and appears to have had little input into whether its product would be introduced into the United States. Certainly, it did not contract with the entity that actually introduced the finished product to the forum. In contrast, the Petitioners designed their product for national consumption, knew their product would be distributed in the forum state, and took active steps to market their product to consumers who lived in New

Hampshire through national and regional publicity. Further, the valve stem manufacturer's economic interest ended when he sold the valve stems in Taiwan. But Petitioners' economic interest remained after HarperCollins began distributing the book in New Hampshire. Each time the book was sold, each Petitioner was entitled to a royalty payment. The plurality in *Asahi Metal* asserted that jurisdiction should not attach when a defendant merely placed his product in the stream of commerce and made no effort to direct it to particular consumers. The case at bar is a far cry from that scenario.

Perhaps most important, in *Asahi Metal* even the plurality recognized that a different result should occur when the defendant's conduct indicated "an intent or purpose to serve the market in the forum state". 480 U.S. at 112. The Supreme Court of New Hampshire specifically found "the defendants deliberately exploited the New Hampshire market". App. 32. This factual conclusion is sufficient to constitute "purposeful availment" even under the more rigorous test proposed by the plurality in *Asahi Metal*. Thus, even if this Court were inclined to revisit the issue of what type of conduct is necessary for jurisdiction to attach under the "stream of commerce" theory, this is not the case to do it. Sufficient factual findings support jurisdiction under any of the tests which have been proposed.

As noted above, Petitioners' real dispute is not with the constitutional principles applied by the Supreme Court of New Hampshire, but with their factual conclusion that Petitioners deliberately intended to exploit the New Hampshire market. Although this Court has the power to decide whether the highest court of a state

reached a permissible factual conclusion, the Court's resources should simply not be devoted to such a review.

### C. The Supreme Court of New Hampshire's Decision Does Not Conflict With Any Decisions of United States Courts of Appeals

The Petitioners' principal argument for granting certiorari is that the Supreme Court of New Hampshire's decision conflicts with two decisions of United States Courts of Appeal, *McFarlane v. Esquire Magazine*, 74 F.3d 1296 (D.C. Cir.), *cert. denied*, 117 S.Ct. 53 (1996) and *Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110 (6th Cir.), *cert. denied*, 115 S.Ct. 423 (1994). A quick review of these cases will demonstrate that *McFarlane* did not reach the constitutional issue and was not even decided on a federal issue, while the fact situation in *Reynolds* was substantially different than the one posed by the present case.

*McFarlane* was a libel claim brought by a former National Security Advisor in the District of Columbia due to the publication of an article in *Esquire* which accused him of being an agent for Israeli intelligence services. Although the Court of Appeals affirmed the District Court's conclusion that the District of Columbia could not exercise personal jurisdiction over a New York author, neither Court did so because the exercise of jurisdiction would offend the Due Process Clause. Instead, the action was dismissed on "state law" grounds: the non-resident author was not subject to service of process under the District of Columbia's long-arm statute, D.C. Code 1981 § 13-423(a). 74 F.3d at 1300-1301.

Unlike many long-arm statutes, the District of Columbia's statute does not extend to the full limits permissible under the United States Constitution. *Parsons v. Mains*, 580 A.2d 1329, 1331 (D.C. 1990).[3] The statute did not extend jurisdiction to persons whose tortious conduct caused injury within the District unless the person engaged in an act or omission within the District. McFarlane could not prove that the author of the magazine article had performed or failed to perform any action within Washington D.C. and his inability to provide this factual predicate deprived him of the ability to use the District's long-arm statute.

A similar statutory ground for declining jurisdiction does not exist here. Indeed, the case *McFarlane* relied upon for holding that a non-resident defendant must perform some act or omission within the District, *Moncrief v. Lexington Herald-Leader Co.*, 807 F.2d 217, 221 (D.C. Cir. 1986) expressly distinguished New Hampshire's long-arm statute from the District's. The New Hampshire statute, N.H. Rev.Stat.Ann. § 510:4, does extend to the full limits of the U.S. Constitution. *Keeton*, 465 U.S. 770, 774, n.4; *Estabrook v. Wetmore*, 129 N.H. 520, 522, 521 A.2d 956, 958 (1987). Indeed Petitioners have conceded that they

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[3] The District of Columbia Court of Appeals has recognized that one part of the District's long-arm statute does extend to the limits of due process, § 13-423(a)(1) (permitting service of process when a claim for relief arises from a person's "transacting any business" in the District of Columbia). In *McFarlane*, however, the plaintiff did not assert jurisdiction under subsection (1). He claimed personal jurisdiction attached under §§ 13-423(a)(3) and 13-423(a)(4), two sections of the long-arm statute which did not extend to the full limits of the Constitution. 74 F.3d at 1300.

are amenable to service of process under the New Hampshire long-arm statute. App. 5, 25. Thus, there is no conflict between *McFarlane* and the New Hampshire court's decision.

In *Reynolds* the Sixth Circuit refused to find the author of an allegedly defamatory press release that was republished in Ohio amenable to that state's jurisdiction. The key facts in that case are so different, however, that there is no conflict with the opinion. In *Reynolds* an international athletic association based in London, England issued a press release stating that a Paris laboratory had found evidence that a U.S. athlete had improperly used drugs in a Monte Carlo track meet. The press release was picked up by various U.S. publications and republished in the athlete's home state of Ohio. He sought to obtain jurisdiction over the athletic association for defamation and other torts which arose out of the association's actions against him.

In *Reynolds*, though, the defendant had no connection with the state of Ohio and it was completely through the acts of third parties with whom it had no affiliation that the allegedly defamatory remarks were republished. Unlike here, the defendant did not have a contract with an agent to make sure the defamatory information was circulated within the forum jurisdiction. Nor did the athletic association issue its statement as part of pre-conceived commercial venture in which the athletic association intended to receive revenues from the dissemination of the information in the forum. And certainly the athletic association did not receive a cash royalty each time the press release was republished within the jurisdiction. In short, unlike the case at bar, there was no

evidence in *Reynolds* that the defendant intended to commercially exploit a market within the forum state.

Contrary to the Petitioners' assertions, the distribution of *Wouldn't It Be Nice* within New Hampshire was not "merely foreseeable", it was deliberate. It was part of a commercial venture to profit from the provision of gossip. This court has recognized that where commercial actors "purposefully derive benefit" from their interstate activities, it is not unfair to require them to account in other states for the consequences that arise proximately from such activities. *Burger King v. Rudzewicz*, 471 U.S. at 474. That is precisely the action the Supreme Court of New Hampshire took when it affirmed the Superior Court's jurisdiction over the Petitioners. Such action does not conflict with any opinion of this Court or any decision of any other appellate court, federal or state.

## CONCLUSION

For the reasons set forth above, the Writ of Certiorari should be denied.

Respectfully submitted,

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